

***United States Court of Appeals
for the Second Circuit***



APPENDIX

Case 802,883

77-2150

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES ex rel. LARRY C. MOSLEY,

Petitioner-Appellant,

vs

Docket No. 77-2150

HAROLD J. SMITH, Supt.,
Attica Correctional Facility,

Respondent-Appellee.

B

UNITED STATES ex rel. DORIS McNAIR,

Petitioner-Appellant,

vs

Docket No. 77-2151

FRANCES CLEMENT, Acting Supt.
Bedford Hills Correctional Facility,

Respondent-Appellee.

On Appeal from the United States District Court
for the Western District of New York

APPENDIX

PREVIOUS OPINIONS & STATE & FEDERAL PENALTIES FOR SALE OF NARCOTICS

Dated: February 15, 1978.

Respectfully submitted,

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A.1

STATE & FEDERAL PENALTIES FOR SALE OF NARCOTICS

Arranged by maximum authorized sentence⁷

TABLE 1
GENERALLY

Mandatory life max.

California	5 yrs. to life.
* Louisiana	life
New York	1-25 yrs. to life

*Probation available for 1st felony offenders. Calif Penal Code §1203!
Adult Authority empowered to redetermine and reduce maximum sentence. Penal Code §3020.
Probation available.*
Minimum depends on quantity sold; see section I of brief.*

Discretionary life (or 99 yrs.) max.

Arizona	5 yrs. to life
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Probation is available, and maximum may be less than life. State v. Tyree, 109 Ariz. 259, 508 P2d 335 (1973). If imprisoned, must serve minimum.

Illinois	4 yrs. to life
Missouri	5 yrs. to life
Montana	1 yr. to life
Texas	5 to 99 yrs.

Probation is available for all 1st drug offenders, §4.12.

50-year max.

New Mexico	10-50 yrs.
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40-year max.

Ohio	20-40 yrs.
Virginia	5-40 yrs.

30-year max.

Mississippi	Up to 30 yrs.
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25-year max.

Delaware	10-25 yrs.
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* Louisiana apparently requires either probation or a life term, with no intermediate sentence. See discussion, §II(B)(3) of brief.

TABLE 1, continued.

20-year max.

Colorado	10-20 yrs.	Mandatory minimum.
Indiana	5-20 yrs.	
Maine	Up to 20 yrs.	
Maryland	Up to 20 yrs.	
Michigan	Up to 20 yrs.	Mandatory minimum.
Nebraska	5-20 yrs.	
Nevada	1-20 yrs.	
New Hampshire	Up to 20 yrs.	
Oklahoma	5-20 yrs.	Mandatory minimum.
Pennsylvania	5-20 yrs.	
Rhode Island	10-20 yrs.	
Wyoming	Up to 20 yrs.	
Illinois	1-20 yrs.	

15-year max.

United States	Up to 15 yrs.	"Special Parole Term" of 3 yrs., permitting extension of maximum by this period if parole is revoked. (U.S.)
Alabama	2-15 yrs.	
Idaho	Up to 15 yrs.	
Minnesota	Up to 15 yrs.	
South Carolina	Up to 15 yrs.	
Tennessee	5-15 yrs.	
Utah	Up to 15 yrs.	
West Virginia	1-15 yrs.	
Wisconsin	Up to 15 yrs.	

10-year max.

Alaska	2-10 yrs.	Mandatory minimum
Connecticut	5-10 yrs.	
Georgia	5-10 yrs.	
Hawaii	Up to 10 yrs.	
Iowa	Up to 10 yrs.	
Kansas	1-10 yrs.	
Kentucky	5-10 yrs.	
Massachusetts	Up to 10 yrs.	
North Carolina	Up to 10 yrs.	
North Dakota	10 days to 10 yrs.	
Oregon	Up to 10 yrs.	
South Dakota	Up to 10 yrs.	
Washington	Up to 10 yrs.	

5-year max.

Arkansas	2-5 yrs.
Florida	Up to 5 yrs.
Vermont	Up to 5 yrs.

1-year max.

Dist. of Columbia	Up to 1 yr.
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TABLE 2EXTENDED TERMS FOR
SALES TO YOUTHMandatory life max.

Colorado	life	Buyer under 25.
Nevada	life	Buyer under 21. Not eligible for parole for 7 yrs.

50-year max.

Virginia	10 to 50	Buyer under 18 & seller 3 yrs. older.
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40-year max.

Indiana	10 to 40	Buyer under 18 & seller 3 yrs. older.
Rhode Island	20 to 40	Buyer under 21. Probation precluded.

30-year max.

Alaska	10 to 30	Buyer under 21.
Delaware	15 to 30	Buyer under 18.
Minnesota	Up to 30	Buyer under 18 & seller 3 yrs. older.
North Carolina	5 to 30	Buyer under 16 & seller over 18.

15-year max.

Florida	Up to 15	Buyer under 21 & seller over 21.
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TABLE 3EXTENDED TERMS FOR
NON-ADDICT SELLERS20-year max.

Connecticut	10 to 20	Seller not drug dependent, as defined in §19-443(19).
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TABLE 4

EXTENDED TERMS FOR
2d OR 3d NARCOTICS CONVICTION

	<u>Second</u>	<u>Third</u>	
<u>Mandatory life max.</u>			
California	10 to life	15 to life	Adult Authority empowered to redetermine and reduce maximum. Penal Code §3020. If buyer under 21. No parole
Nevada	life		
<u>Discretionary life max.</u>			
Alaska		life	Buyer under 21
Arizona	10 to life	15 to life	Buyer under 21. No suspended sentence, but may commit to narcotics rehab. program. Mandatory minimum.
Arkansas		15 to life	
Florida		20 to life	
Georgia	10 to life		
Indiana	20 to life		Buyer under 18 & seller 3 yrs. older.
	40 to life		
Missouri	10 to life		Buyer under 21.
	life or death		
North Dakota	not less than 20 yrs.		
<u>60-year max.</u>			
Mississippi	Up to 60		
<u>50-year max.</u>			
Delaware	25 to 50		Buyer under 18.
<u>40-year max.</u>			
Alaska		20 to 40	
Colorado		20 to 40	
Maryland	Up to 40		
Michigan	Up to 40		
Nebraska	10 to 40		
Rhode Island		20 to 40	
South Dakota		Up to 40	
Wyoming	Up to 40		

TABLE 4, continued

	<u>Second</u>	<u>Third</u>	
<u>30-year max.</u>			
United States	Up to 30		"Special Parole Term" of 6 yrs., permitting extension of maximum by this period if parole is revoked.
Alabama	Up to 30		
Alaska	4 to 30		
Colorado	15 to 30		Buyer under 21.
Delaware	15 to 30		Must serve 5 yrs.
Florida	Up to 30		
Idaho	Up to 30		
Iowa	Up to 30		
North Carolina		10 to 30	
South Carolina	5 to 30		
Texas	Up to 30		
West Virginia	2 to 30		
Wisconsin	Up to 30		
<u>24-year max.</u>			
New Jersey	Up to 24		
<u>20-year max.</u>			
Alaska	10 to 20		
Maine	5 to 20		Mandatory minimum.
Nevada	1 to 20		No parole.
North Carolina	Up to 20		
Washington	Up to 20		
<u>15-year max.</u>			
Connecticut	10 to 15		
Florida	Up to 15		
Massachusetts	5 to 15		No suspended sentence, but may commit to narc. rehab. prog.
South Dakota	Up to 15		
Utah	Up to 7 to 15		
<u>10-year max.</u>			
Arkansas	5 to 10		
Dist. of Columbia	Up to 10		

TABLE 5
EXTENDED TERMS FOR
2d NARCOTICS SALE CONVICTION

Discretionary life max.

Delaware	30 to 99
New Mexico	life
Pennsylvania*	life*
Rhode Island	30 to life
Texas	10 to life

Must serve 15.

*For 3rd narcotics sale conviction.
 Buyer under 21. No probation.

30-year max.

Colorado	15 to 30
Connecticut	15 to 30
Minnesota	1 to 30
Pennsylvania	10 to 30
Rhode Island	15 to 30
Tennessee	10 to 30

Mandatory minimum.

25-year max.

Massachusetts	10 to 25
New Hampshire	Up to 25
Vermont	10 to 25

20-year max.

Kentucky	10 to 20
Maine	5 to 20

15-year max.

Florida	Up to 15
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12-year max.

Mississippi	Up to 12
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STATUTORY CITATIONS

The preceding tables of the laws of other states and the federal government concerning the penalties for the sale of narcotics are derived from the following statutes:

- 12 U.S.C.A. §841
- Code of Ala., Title 22, §§258(29, 49, 53).
- Alaska Stat. (1962), §§17.10.010, 17.10.200.
- Ariz.Rev.Stats.(1961), §36-1002.02.
- Ark.Stats. (1947), §§82-1002, 82-1020.
- West's Anno. Calif. Codes, Health & Safety Code, §§11352, et seq.;
Penal Code, §§1203, 3020-25
- Colo.Rev.Stats.(1963), §48-5-20.
- Conn.Gen.Stats.Anno., §§19-480, 19-480a.
- Del.Code Ann., Title 16, §§4725, 4727, 4730.
- D.C. Code Encyclopedia, §§33-402, 33-423.
- Fla.Stats.Anno., §§398.03, 398.22, 775.082, 775.083, 775.084.
- Ga.Anno.Code (1967), §§79A-803, 79A-9911
- Hawaii Rev.Stats., Title 37, Act 9, S.L.H. 1972, §§660-62, 1240, 1242.
- Idaho Code, §§37-2732, 37-2739.
- Smith-Hurd Ill.Anno.Stat., Ch. 38, §1005-8-1; Ch. 56½, §1401(b).
- Burns Ind. Stats., §§10-3558 to 3566.
- Ia. Code Anno., §§204.401, 204.411.
- Kan.Stats., §§65-4121, 65-4124.
- Ky.Rev.Stats., §§218A.140, 218A.990, 431.190
- La.Rev.Stats., §§40.986(8)(1), 40.982
- Maine Rev.Stats.Anno., Title 22, §2362-C.
- Anno.Md.Code, Art. 27, §§286, 293.

Anno. Laws of Mass., Ch. 94C, §32.
Mich.Stats.Anno., §§18.1070(41,48).
Minn.Stats.Anno., §§152.09, 152.15.
Miss.Code 1972 Anno., §§41-29-139, 41-29-147.
Anno.Mo. Stats., §§195.020, 195.200.
Rev.Codes of Mont. (1947), §§540132.
Rev.Stats.Neb., §1943.
Nev.Rev.Stats.Anno., §453.321.
N.H.Rev.Stats.Anno.(1966), §318-B:26.
N.J.Stats.Anno., §§24:21-19, 24:21-29.
N.M.Stats.(1953), §§54-11-20, 40A-29-3.
N.Y. Penal Law, §§70.00 & related sections, §§220.39, 220.41, 220.43.
Gen.Stats.of N.C., §§90-86, 90-116.8.
N.D. Century Code, §§19-03.1-23, 19.03.1-31.
Page's Ohio Rev.Code Anno., §§3719.20, 3719.99.
Okla.Stats.Anno., Title 63, §§2-401, 2-412.
Ore.Rev.Stats., §§161.605, 161.625, 167.207.
Purdon's Pa.Stats.Anno., Title 35, §§780-4, 780-20.
Gen.Laws of R.I.(1956), §21-28-32.
Code of Laws of S.C.(1962), §32-1510.49.
S.D. Compiled Laws (1967), §§39-17-88, 39-17-90.
Tenn.Code Anno., §§52-1432, 52-1434.
Vernon's Texas Civil Code, Art. 4476-15, §§4.10(b)(1), §4.12.
Utah Code Anno. (1953), §58-37-8.
Vt.Stats.Anno., Title 18, §§4205, 4224.
Code of Va. (1950), §54-524.101:1.
Rev.Code of Wash.Anno., §§69.50.401, 69.50.408.
W.Vir.Code, §§60A-4-401, 60A-4-408.
West's Wis.Stats.Anno., §§161.41, 161.48.
Wyo.Stats.(1957), §§35-347.31, 35-347.38.

~~In the *Di Bella* case (*supra*) the majority of the Appellate Division of this Department upheld suspension of a hearing on charges of misconduct pending resolution of criminal charges based on the same facts as gave rise to the charges of misconduct. However, in that case there was no allegation that the petitioner was deprived by the suspension of the opportunity to earn a living. In the cited case the petitioner had not worked as a longshoreman for a long period prior to his suspension.~~

~~The facts at bar are different from those in the cited case. Petitioner's livelihood at the time of his suspension came from the licenses and positions from which he was suspended. He shows that the only living which he can now earn is through different employment at a much lesser salary. Therefore, the reasoning in the dissent in *Di Bella* is clearly applicable to the case at bar and it is a denial of petitioner's right to due process under the Federal and State Constitutions for his suspension to continue in the manner in which it now stands.~~

~~Accordingly, it is adjudged that respondent shall conduct a hearing upon the charges against petitioner within 30 days after service of the judgment to be settled hereupon with notice of entry or at its option respondent may reinstate petitioner's licenses and positions until the commencement of the trial of the criminal charges against petitioner or until such time as it can show that any delay of the criminal trial is occasioned by petitioner.~~

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v. LARRY CHARLES MOSLEY, Defendant.

County Court, Monroe County, August 20, 1974.

Constitutional law—drug law—provision in section 70.00 (subd. 2, par. [a]) of Penal Law for imposition of mandatory maximum sentence of life imprisonment upon person convicted of drug offense classified as A-III felony is unconstitutional as violative of prohibition against cruel and unusual punishment—defendant who has pleaded guilty to such offense will be sentenced under law controlling class C felony, classification of his offense prior to enactment of State's new drug law in 1973.

1. The provision in section 70.00 (subd. 2, par. [a]) of the Penal Law for the imposition of a mandatory maximum sentence of life imprisonment upon a person convicted of a drug offense classified as an A-III felony is unconstitutional as violative of the prohibition against cruel and unusual punishment (U. S. Const., Eighth Amdt., N. Y. Const., art. I, § 5).

2. A defendant who has pleaded guilty to the criminal sale of a controlled substance in the third degree, a class A-III felony, will be sentenced under the law controlling a class C felony, the classification of that crime prior to the enactment of the State's new drug law in 1973.

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OF NEW YORK, Plaintiff, v. LARRY
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 in 1973.

PEOPLE v. MOSLEY [78 Misc 2d 736]

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*Peter L. Yellin, Public Defender (Leslie A. Bradshaw of
 counsel), for defendant. Jack B. Lazarus, District Attorney
 (Melvin Bressler of counsel), for plaintiff.*

ANDREW G. CELLI, J. The defendant pled guilty on July 19,
 1974 to a charge of criminal sale of a controlled substance in the
 third degree. The guilty plea was in satisfaction of two indict-
 ments, one of which alleged conduct occurring after September
 1, 1973 the effective date of the new drug law. The defendant
 is thus directly and immediately subject to the sentencing pro-
 visions of the new law, under which the said offense is designated
 an A-III felony. (Penal Law, § 220.39, subd. 1.) The following
 conditions describe his circumstance: 1. Mandatory maximum
 term of life imprisonment. (Penal Law, § 70.00, subd. 2, par.
 [a].) 2. Mandatory minimum term of from one to eight and
 one-third years. (Penal Law, § 70.00, subd. 3, par. [a], cl. [iii].)
 3. No possibility of probation, conditional discharge, or uncon-
 ditional discharge. (Penal Law, § 60.05, subd. 1.) 4. Lifetime
 parole (Penal Law, § 70.40, subd. 1) assuming the defendant
 succeeds in being released from prison. 5. No possibility of
 civil commitment to the Drug Abuse Control Commission,
 despite a finding of addiction. (Mental Hygiene Law, § 81.25,
 subd. [a], par. 3.) 6. No possibility of youthful offender treat-
 ment. (CPL 720.10, subd. 2.) 7. No possibility of having the
 charge reduced through plea bargaining. (CPL 220.10, subd.
 6, par. [a].)

This matter comes before the court on motion of the defendant
 to declare section 70.00 (subd. 2, par. [a]; subd. 3, par. [a], cls.
 [i], [ii], [iii]) of the Penal Law unconstitutional as violation of
 the Eighth Amendment prohibition of cruel and unusual
 punishment and on other grounds.

The prohibition against cruel and unusual punishment was
 incorporated into the United States Constitution as a part of
 the Eighth Amendment in 1791. The phrase had found its way
 into the English Bill of Rights in 1688, into the Virginia Declara-
 tion of Rights in 1776, and into James Madison's proposed
 constitutional amendments in 1789. (33 ALR 3d 349.) After
 1791 almost every State constitution, including New York's,
 adopted identical or similar prohibitions. While many questions
 have been raised as to the intended meaning, and many remain,
 certain questions have been settled by clear precedent. Thus, it
 is clear that the prohibition is a dynamic concept to be con-
 tinually evaluated and re-evaluated in light of a continually
 changing society. We are not to ask ourselves what was cruel
 and unusual in 1791, but what is cruel and unusual today.

(*Weems v. United States*, 217 U. S. 349.) As stated in *Goss v. Bomar* (337 F. 2d 341, 343) "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

Secondly, it has been settled that the humane and necessary stricture of the Eighth Amendment is not directed solely against the method, manner, or nature of punishment, but also against the length, severity and proportionality of the punishment to the offense in question. This rule was first given the highest force of law in *Weems v. United States* (217 U. S. 349, *supra*). In that case the Supreme Court held unconstitutional as cruel and unusual a mandatory minimum term of 12 years' imprisonment in chains at hard and painful labor for the offense of making false entries in government cash books. "It is a precept of justice", said the court (p. 367) "that punishment for crime should be graduated and proportioned to offense." The court also noted that less severe punishments were prescribed in other jurisdictions for similar crimes and even for more serious crimes. The same rule of proportionality was recognized in *Furman v. Georgia* (408 U. S. 238, rehearing den. 409 U. S. 902) and in numerous cases of other jurisdictions, a few of which will be discussed presently.

Thirdly, the court notes that it can no longer be questioned that the Eighth Amendment's ban on cruel and unusual punishment is applied to the States through the Fourteenth Amendment. This was made clear in *Robinson v. California* (370 U. S. 660).

The court's attention has been directed to the broad, penetrating pronouncement of the Supreme Court of California in *Matter of Lynch* (8 Cal. 3d 410). The court there, in declaring cruel and unusual a mandatory life term for a second offense of indecent exposure, isolated severe tests to be employed in determining whether a punishment is cruel and unusual. They are: (1) whether the punishment fits the offense and the offender, keeping in mind the danger to society and the penological purpose of rehabilitation; (2) comparison of the challenged punishment with punishment prescribed in the same jurisdiction for more serious offenses; and (3) comparison of the challenged punishment with that prescribed for the same offense in other jurisdictions. The court notes that similar tests were applied in *Hart v. Coiner* (483 F. 2d 136) holding a mandatory life sentence under the recidivism statute for a bad check offense to be unconstitutional as cruel and unusual.

The court case, and other be measured offense [tak nature of the the particular ness of the e the punishm the same ju punishment recommend of the court

Before relevant, it believes to will not sit of rights o later come sentence in scrutiny. stitute crue *supra*, p. 30

(1) Nat sale of a present a d tion of the the court n users and material h serious do the opiates

It is also should be purported statute. T the quanti bags or required. the trans unacceptable sider the stranger; humanita

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PEOPLE v. MOSLEY [78 Misc 2d 736]

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el and unusual.

The court believes on the basis of the *Lynch* case, the *Weems* case, and other cases that the constitutionality of a sentence may be measured by means of the following tests: (1) nature of the offense [taking into consideration the violent or nonviolent nature of the crime, the aggravated or nonaggravated nature of the particular circumstances of the case, the degree of dangerousness of the crime to society; (2) the nature of the offender; (3) the punishment compared with punishment for other offenses in the same jurisdiction; (4) the punishment compared with the punishment for the same offense in other jurisdictions; (5) the recommendations of model legislation; and (6) the conscience of the court.

Before considering these factors which the court believes relevant, it would be important to mention what the court believes to be irrelevant: the possibility of parole. The court will not sit idly by and justify an unconstitutional deprivation of rights on the ground that an administrative agency may later come along and correct or reduce the injustice. The sentence imposed on every defendant must pass constitutional scrutiny. The court notes that lifetime parole may itself constitute cruel and unusual punishment. (*Weems v. United States*, *supra*, p. 366.)

(1) Nature of the offense. The court notes at the outset that sale of a drug is not a violent act. The sale itself does not present a danger to the user or to society. But lest this application of the test to the sale be considered too narrow and myopic, the court notes that even the use may not present the danger to users and to society which is popularly imagined. Voluminous material has been submitted which at the very least raises a serious doubt in the court's mind as to the inherent danger of the opiates.

It is almost ironic that circumstances of the individual case should be one of the measures used, since that is a matter purportedly removed from consideration of the court by the statute. The court is not permitted to take into consideration the quantity of narcotic sold: whether a single fix, a thousand bags or a million dollar shipment. Life imprisonment is required. This court is not allowed to consider the nature of the transaction: whether a sale for money, an exchange, gift or unaccepted offer. Life imprisonment. Nor can the court consider the relationship of the parties: whether spouse, friend or stranger; nor the motivation of sale: whether for profit or humanitarian gesture of helping a sick friend; nor the seller's

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status in the narcotic distribution system: whether importer, kilo connection, ounce man, street dealer, pusher, or nonseller passing a needle. Life imprisonment is required in all cases, and in all cases the law thus presumes the worst.

(2) Nature of offender. It is a fundamental precept of our system of justice that the punishment should not only fit the offense, but the offender. Our system of separation of powers demands that this should be so. Moreover, rehabilitation has been recognized as the major objective of criminal punishment. (*Williams v. New York*, 337 U. S. 241; *People v. Oliver*, 1 N Y 2d 152.) In the latter case the court noted that (p. 160) "there is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution". Again, however, with the law before the court, no allowance for this fundamental precept is made. The court is not allowed to consider the status of the buyer, whether addict or nonaddict. Nor may it consider the qualities of the offender, whether young or old, family man or not, high or low rehabilitative potential, value or potential value to society. In all cases there is a mandatory maximum of life imprisonment.

(3) Other crimes in the jurisdiction. The sale of narcotics is punished more severely and inflexibly than any other offense in the State of New York.

Aside from drug offenses, only arson in the first degree [causing explosion in occupied building] (Penal Law, § 150.20); kidnapping in the first degree (Penal Law, § 135.25); murder (Penal Law, § 125.25); and attempted murder of a peace officer (Penal Law, § 110.05, subd. 1); carry mandatory life terms. Of all the Class A felonies, only the narcotics possession and sale offenses are prohibited from being reduced by plea bargaining below the A-III level (CPL 220.10, subd. 6, par. [a]); which still carries a mandatory life maximum, and only those convicted of narcotics possession and sale offenses are barred from being absolutely discharged from their sentences after five years of unrevoked parole. (Correction Law, § 212, subd. 8.)

Not even a persistent [third] felony offender is subject to a mandatory life sentence. Such a sentence may be imposed only if the court decides that it is necessary for the public interest because of the history and character of the defendant and the nature and circumstances of his criminal conduct, and the court must state in the record its reasons for these conclusions. (Penal Law, § 70.10, subd. 2.)

The next lower felony classification [Class B] which carries a discretionary maximum of 25 years and no mandatory mini-

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None of this applies to the narcotics "seller". Whether he sells a bag of heroin for profit or to support his own addiction, or whether he gives away a "fix" to a desperately sick friend suffering from withdrawal pains (where the consequences to the "victim" and to society are minimal, by any scale of values), the mandatory maximum penalty of life remains the same. He must be punished much more severely than the armed robber who shoots his victim and the multiple rapist. He must

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be punished as severely as the most heinous murderers, kidnappers, and arsonists, and more severely than many of them. He is even denied the privileges accorded to *all* other criminal defendants, including multiple and persistent felony offenders, of plea bargaining and of judicial discretion in setting the maximum term in accordance with the nature and circumstances of the particular criminal conduct involved and with the history and character of the defendant.

In the opinion of the court, no view of the dangerousness of narcotics to persons or society can justify such disproportionate punishment.

(4) Same crime in other jurisdictions. It is natural, logical and necessary in deciding whether a statute is violative of the Eighth Amendment, to compare the punishment which it prescribes with the punishment prescribed for the same offense elsewhere in the country. One word describes our law: the toughest. Thirteen States: Alaska, Connecticut, Georgia, Hawaii, Iowa, Kansas, Kentucky, Massachusetts, North Carolina, North Dakota, Oregon, South Dakota, Washington, authorize a maximum of 10 years. Eight States: Alabama, Idaho, Minnesota, South Carolina, Tennessee, Utah, West Virginia, Wisconsin and the Federal Government authorize a maximum of 15 years. Twelve States: Colorado, Indiana, Maine, Maryland, Michigan, Nebraska, Nevada, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, Wyoming, authorize a maximum of 20 years. Three States: Arkansas, Florida, Vermont, authorize five years, and the District of Columbia limits the penalty to one year. Five States: Arizona, Illinois, Missouri, Montana and Texas, authorize life terms but do not require them. Five other States authorize but do not require maximum terms varying from 25 to 50 years. Only California and Louisiana have mandatory life terms for the sale of narcotics but neither State has accompanying provisions as severe as New York's. Thus, for example, the California statute does not contemplate lifetime parole nor disallow plea bargaining. And Louisiana permits participation in a rehabilitation program, discharge from probation after one year, and other benefits.

It seems incomprehensible to the court that a man involved in the sale of narcotics at the four corners in Rochester, may be prosecuted in Federal court, one block to the north, and may under Federal law receive a probationary sentence (U. S. Code, tit. 21, §§ 841-843, § 849) but if he is prosecuted in this court,

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PEOPLE v. MOSLEY [78 Misc 2d 736]

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(5) Model legislation. All major and respected model legisla-
 tion and reports condemn life imprisonment. Among these
 groups are the Model Penal Code of the American Law Institute
 (1962), the Model Sentencing Act of the Advisory Council of
 Judges of the National Council on Crime and Delinquency
 (1963). Five-year maximums and avoidance of long maximum
 terms are recommended. (Model Sentencing Act, § 9; Model
 Penal Code, § 6.06.) Lengthy terms are reserved for those who
 have committed particularly heinous crimes. (President's Task
 Force on the Courts [off. ed.], p. 180.) The possibility of
 discharge from parole is also recommended. (Model Penal
 Code, § 305.12.)

(6) Conscience of the court. There is one test the court deems
 more important than the others: the conscience of the court.
 It is a tribute to our system that the more fundamental a question
 becomes, the more human and less legalistic becomes the source
 of answer. The court does not need precedent to comprehend
 the effect upon a defendant of a life sentence. The court must
 react as a man as well as a jurist. This life sentence provision
 is a statute without mercy. It is a statute without the possibility
 of mercy. It is without compassion. It is vindictiveness retribu-
 tion. It offends the conscience of the court and beyond reason-
 able doubt the principles inherent in our Constitution. The
 court cannot and will not suffer the quality of mercy to be
 strained. It cannot permit the Legislature to repeal compassion.
 Conscience must stand. The statute must fall.

The court has measured the statute by all approved tests and
 has found it wanting. Accordingly, it is the judgment of this
 court that section 70.00 (subd. 2, par. [a]) of the Penal Law,
 imposing a mandatory sentence of life imprisonment upon a
 person convicted of an A-III felony, is unconstitutional as
 violative of the Eighth Amendment to the United States Con-
 stitution and section 5 of article I of the New York State
 Constitution. Having so concluded, the court need not reach the
 question of whether the statute violates the defendant's right to
 equal protection of the laws.

Since the court has found that the classification for the crime
 of selling a narcotic drug is unconstitutional and violates the
 United States and New York State Constitutions, the question
 then remains what constitutional punishment should be imposed?
 The present law was enacted and became effective September 1,

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1973. By reason of this decision the court reinstitutes the law prior to that time and reclassifies the crime as a class C felony. The defendant, following completion of his presentence investigation, will be sentenced thereunder.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v. SKEL
GARDNER, Also Known as SYLVESTER GARDNER, Defendant.

Supreme Court, Criminal Term, Westchester County, September 6, 1974.

Constitutional law — drug law — provisions in Penal Law which classify certain drug offenses as A-I, A-II and A-III felonies and provide for imposition of mandatory maximum sentence of life imprisonment upon person convicted of such offense, do not violate constitutional prohibition against cruel and unusual punishment — claim that provision requiring recommendation by prosecutor before offender convicted of drug offense classified as A-III felony may be sentenced to probation transfers undue amount of power of punishment to prosecutor raises no justiciable constitutional issue, and, in any event, final decision still rests with judicial arm — provision which forecloses defendant from pleading guilty to lesser offense than class A felony where indictment charges him with any class A drug crime does not unconstitutionally discriminate against class of individuals indicted for A-III drug crime — no justiciable constitutional issue is raised by claim of inequality in plea bargaining rights based upon fact that criminal action may be commenced either by indictment or by filing of felony complaint in inferior court.

1. Provisions in the Penal Law, including sections 70.00 (subd. 2, par. [a]), 220.16 and 220.39 thereof, which were enacted in 1973 as part of the State's new drug law, and which classify certain drug offenses as A-I, A-II and A-III felonies and provide for the imposition of a mandatory maximum sentence of life imprisonment upon a person convicted of such an offense, do not violate the constitutional prohibition against cruel and unusual punishment.

2. A claim that section 65.00 (subd. 1, par. [b]) of the Penal Law, providing for the sentencing of an offender to lifetime probation upon conviction of a drug offense classified as an A-III felony and requiring, as one of the conditions for imposition of such a sentence, that the prosecutor recommend it, transfers an undue amount of the power of punishment to the prosecutor, amounts to a baseless onslaught against prosecutorial discretion and raises no justiciable constitutional issue. Moreover, under the terms of that section, the final decision as to the propriety of lifetime probation rests with the judicial arm.

3. CPL 220.10 (subd. 6, par. [a]), which forecloses a defendant from pleading guilty to any lesser offense than a class A felony where the indictment charges him with one of the class A felonies defined in article 220 of the Penal Law dealing exclusively with drug offenses, does not constitute constitutionally impermissible discrimination in favor of the class of individuals who have been indicted for A-I, A-II, B, C, D and E felonies, drug oriented or not, and against the class of individuals who have been indicted for A-III felonies. The proscription against guilty pleas to lesser offenses where the indictment charges an A-III drug crime rationally promotes the legislative objective of deterring drug abuse and traffic.

4. No justiciable constitutional issue is raised by a claim of inequality in plea bargaining rights based upon the fact that a criminal action may be commenced either by an indictment or by the filing of a felony complaint in an inferior

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~~days to enable respondent to apply to Justice FRAIMAN for restoration of the bail originally granted.~~

~~KUPFERMAN, J. P., MURPHY and LANE, JJ., concur.~~

~~Petition for an order pursuant to the provisions of CPLR article 78, in the nature of prohibition, unanimously granted, without costs and without disbursements, the order granting bail in the amount of \$10,000 is vacated, on the law, and declared void and respondent, Greene, remanded to custody. However in the interest of justice the effect of the order entered herein is stayed for a period of 10 days from the date of entry thereof to enable respondent, Greene, to apply to Justice FRAIMAN for restoration of the bail originally granted.~~

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
DORIS ANN McNAIR, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. LARRY C.
MOSELY, Respondent.

Fourth Department, January 16, 1975.

Constitutional law — drug law — mandatory sentencing provisions for drug related convictions are not unconstitutional, and similar treatment for addict and nonaddict and lifetime supervision for offenders have reasonable justification.

The mandatory sentencing provisions of the Penal Law (§§ 220.18, 220.39; § 70.00, subd. 2, par. a; § 70.00, subd. 3, par. a, subpar. ii) in drug related convictions are not unconstitutional as violating the Eighth Amendment of the United States Constitution and section 5 of article I of the New York State Constitution. The punishment is not so severe as to be degrading, nor arbitrarily inflicted, unacceptable to contemporary society, disproportionate to the crime or failing to serve a penal purpose more effectively than a less severe punishment. The fact that sale of heroin is a heinous, essentially violent crime justifies similar treatment for addict and nonaddict alike, and because of the high recidivist rate among felons convicted of narcotics crimes, the Legislature did not act without reasonable justification in providing for lifetime supervision for released offenders as a protection for the public.

People v. Mosely, 78 Misc 2d 736, reversed.

APPEAL in the first above-entitled action from a judgment of the Monroe County Court (EUGENE W. BERGIN, J.), rendered April 22, 1974, upon a verdict convicting defendant of criminal possession of a controlled substance in the second degree, criminal use of drug paraphernalia (two counts) and criminal possession of a hypodermic instrument.

APPEAL in the second above-entitled action from a judgment of the Monroe County Court (ANDREW G. CELLI, J.), rendered

September 20, 1974, convicting defendant of criminal sale of a controlled substance in the third degree upon his plea of guilty.

Peter L. Yellin (Robert S. Beer of counsel), for Doris Ann McNair, appellant.

Jack B. Lazarus, District Attorney (Melvin Bressler of counsel), for the People, respondent.

Jack B. Lazarus, District Attorney (Melvin Bressler of counsel), for the People, appellant.

Peter L. Yellin (Leslie Bradshaw of counsel), for Larry C. Mosely, respondent.

Louis J. Lefkowitz, Attorney-General (Peter J. Dooley and Ruth Kessler Toch of counsel), in his statutory capacity under section 71 of the Executive Law.

New York Civil Liberties Union (Kenneth P. Norwick and David W. Beier, III) *amicus curiae*.

CARDAMONE, J. We are called upon to determine in these two appeals, which have been consolidated for this purpose, whether sentencing provisions of the Penal Law which mandate life sentences in cases of certain drug related convictions are unconstitutional as violating the Eighth Amendment of the United States Constitution and section 5 of article I of the New York State Constitution as constituting cruel and unusual punishment.

FACTS

In *Mosely*, the People appeal pursuant to CPL 450.20 (subd. 4) from a judgment (insofar as it imposed sentence) of the Monroe County Court which declared unconstitutional section 70.00 (subd. 2, par. [a]) and section 70.00 (subd. 3, par. [a], cl. [iii]) and the last sentence of section 220.39 of the Penal Law, as amended in 1973. Defendant Larry C. Mosely was charged with criminal sale of a dangerous drug in the third degree under former sections 220.35 and 70.00 of the Penal Law by the Monroe County Grand Jury on November 16, 1973. On February 3, 1974, defendant was further charged by the Grand Jury with criminal sale of a controlled substance in the third degree under subdivision 1 of section 220.39 of the Penal Law. On July 19, 1974 defendant pled guilty to the latter indictment under the amended Penal Law in satisfaction of all charges. According to an information signed by the District Attorney, defendant had a prior record of conviction of the felony of grand larceny in 1970. The trial court sentenced defendant Mosley,

upon his plea of guilty to the charge of criminal sale of a controlled substance, third degree to a term of from three to six years' imprisonment under the law in effect prior to its amendment in 1973.

In *McNair*, defendant Doris A. McNair appeals from a judgment of the Monroe County Court entered April 22, 1974, convicting defendant, following a jury trial, of criminal possession of a controlled substance, second degree, criminal use of drug paraphernalia (2 counts) and criminal possession of a hypodermic instrument. Criminal possession of a controlled substance in the second degree is a class A-II felony (Penal Law, § 220.18) and is punishable by a mandatory maximum term of imprisonment for life (Penal Law, § 70.00, subd. 2, par. [a]) and a mandatory minimum of not less than six years nor more than eight and one-third years (Penal Law, § 70.00, subd. 3, par. [a], cl. [ii]). Defendant was sentenced by Monroe County Court to concurrent terms of six years to life at Bedford Hills State Correctional Facility on the felony count and one year each on the other convictions.

LEGAL TESTS APPLICABLE

Historically, our system of government has recognized the function of the legislative branch to define crimes and prescribe punishments and that such questions are in the first instance for the judgment of the Legislature alone (see *Matter of Lynch*, 8 Cal. 3d 410). The courts declare an act of the Legislature unconstitutional only when the unconstitutionality of the statute is "clear" (*Garcia v. Pan Amer. Airways*, 183 Misc. 258, affd. 269 App. Div. 287, affd. 295 N. Y. 852, cert. den. 329 U. S. 741) and "without doubt" (*People v Crane*, 214 N. Y. 154, 173, affd. 239 U. S. 195), since courts ordinarily have no power to substitute their opinions for the judgment of the Legislature (*Williams v. Mayor*, 289 U. S. 36, 46). A legislative enactment carries a strong presumption of constitutionality (*Warmuth v. Allen*, 14 N. Y. 2d 391, 397; *Defiance Milk Prods. Co. v. Du Mond*, 309 N. Y. 537, 540-541; *Matter of Watson*, 226 N. Y. 384, 404), including in it the presumption that the Legislature has found facts sufficient to support its enactment (*I. L. F. Y. Co. v. Temporary State Housing Rent Comm.*, 10 N. Y. 2d 263, 269). Moreover, "it is a firmly established principle, and one which has become cardinal and elementary in the field of constitutional law, that the propriety, wisdom, necessity, adequacy, efficacy, utility, desirability, and expediency of legislation are not matters which are to be considered by the courts."

(8 N. Y. Jur., Constitutional Law, § 72, pp. 599-602, and cases therein cited). The reason for this principle and the strong presumption of constitutionality is that the public interest requires, under ordinary circumstances, that legislative enactments be given recognition and enforced by the courts as embodying the will of the People (*Zorach v. Clauston*, 303 N. Y. 161, 172, *affd.* 343 U. S. 306). The burden of proving these provisions of the amended Penal Law unconstitutional is on the defendants (*Lindslev v. Natural Carbonic Gas Co.*, 220 U. S. 61, 79; *Matter of Fay*, 291 N. Y. 198, 206; *People v. Pagnotta*, 25 N. Y. 2d 333, 337) and, if the proof with respect to this issue is not clear, but only doubtful, courts will not declare a statute unconstitutional (*People v. Crane*, 214 N. Y. 154, *affd.* 239 U. S. 195, *supra*).

THE STATUTES

The drug problem, as it exists today in New York State, needs no citation of authority to establish its pervasive existence. Narcotics addiction, particularly heroin addiction, is undoubtedly one of the most serious social evils confronting American society today.¹ The legislative response to this problem was the enactment of chapters 276 to 278 of the Laws of 1973. These laws, under attack on this appeal, reclassified class A felonies which subject a convicted defendant to an indeterminate sentence with a mandatory maximum term of life imprisonment, and with various mandatory minimum terms for the subclasses A-I, A-II and A-III, down to a minimum of one year (Penal Law, § 70.00, subd. 2, par. [a] and § 70.00, subd. 3, par. [a], cl. [iii]).

Other sections of the statute are the probation requirements (Penal Law, § 65.00, subd. 1, par. [b]; subd. 3, par. [a], cl. [ii]), lifetime parole (Penal Law, § 70.40, subd. 1), restriction on civil commitment (Mental Hygiene Law, § 81.25, subd. [b], par. 3), prohibition of youthful offender treatment (CPL 720.10, subd. 2), and limitation on plea bargaining (CPL 220.10, subd. 6, par. [a]).

CONSIDERATION OF THE MERITS

The defendants primarily assert that section 220.39 of the Penal Law is unconstitutional as violative of the Eighth Amend-

1. Estimates of the total number of narcotic addicts in the United States vary greatly. In 1971 the National Institute of Mental Health, based on a wide range of data, estimated the addict population in the United States at between 250,000 and 315,000. It is generally conceded that well over half of this population is based in New York City (*Licit and Illicit Drugs*, by Brecker and the Editors of Consumer Reports — [Little, Brown & Co., Boston, 1972, p. 72]).

ment ban on cruel and unusual punishment in that the sentence prescribed is disproportionate to the offense. In its earliest years the United States Supreme Court adopted a "historical" interpretation of the Cruel and Unusual Punishments Clause. In *Matter of Kemmler* (136 U. S. 436, 446) the court declared that "if the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition." However, as several of the Justices noted, the "looking backwards" approach was decisively repudiated in *Weems v. United States* (217 U. S. 349). Were it not, and had the "historical" interpretation of the clause prevailed, the "cruel and unusual punishments" prohibition would have been effectively read out of the Bill of Rights (*Furman v. Georgia*, 408 U. S. 238, 265 [BRENNAN, J., concurring]). The Eighth Amendment proscription against "cruel and unusual punishments" is applicable to the States through the Fourteenth Amendment. (See *Robinson v. California*, 370 U. S. 660; see, also, *People v. Davis*, 33 N Y 2d 221.)

The Cruel and Unusual Punishments Clause like other great provisions of the Constitution is not susceptible to precise definition (*Trop v. Dulles*, 356 U. S. 86, 99). Recently, the United States Supreme Court was called upon to test the ultimate form of punishment, the taking of a human life, against the prohibition of that clause (*Furman v. Georgia*, *supra*). A review of the concurring opinions by the several members of the majority of the Supreme Court in *Furman* reveals the following four generalized criteria for assessing constitutional validity of punishments imposed by sentencing statutes. The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. A second guiding principle is that the State must not arbitrarily inflict a severe punishment. Thirdly, inherent in the clause is that a punishment must not be unacceptable to contemporary society. Finally, the fourth principle implicit in the clause is that a punishment must not be excessive.

Whether a punishment is excessive is determined by a two-pronged test. A punishment may be so severe as to be excessive because it is disproportionate to the crime (*O'Neil v. Vermont*, 144 U. S. 323, 339-340) or because the punishment serves no penal purpose more effectively than a less severe punishment (*Furman v. Georgia*, *supra* [BRENNAN, J., concurring p.

280, MARSHALL, J., concurring p. 331]; see, e.g., *Wilkerson v. Utah*, 99 U. S. 130, 134; *Weems v. United States*, 217 U. S. 349, 381; *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459, 464). The "cruel and unusual punishment" clause of the Eighth Amendment immediately follows language that prohibits "excessive" bail and "excessive" fines. As Justice MARSHALL said in *Furman* (p. 332): "the entire thrust of the Eighth Amendment is, in short, against 'that which is excessive'". Thus, it is appropriate to conclude that a punishment may violate the Eighth Amendment as well as section 5 of article I of the New York Constitution if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it offends fundamental notions of human dignity and is therefore shocking to the moral sense of the community (see, e.g., *Matter of Lynch*, 8 Cal. 3d 410, *supra*; *People v. Lorentzen*, 387 Mich. 167; *State v. Evans*, 73 Idaho 50; *Workman v. Commonwealth*, 429 S. W. 2d 374 [Ky.]; and see generally, Length of Sentence as Violation of Constitutional Provisions Prohibiting Cruel and Unusual Punishment, Ann. 33 ALR 3d 335; Federal Constitutional Guaranty against Cruel and Unusual Punishment—Supreme Court Cases, 33 L. ed. 2d 932).

Considering these tests, we do not believe that the punishment imposed by these penal statutes is so severe as to be degrading, nor arbitrarily inflicted, unacceptable to contemporary society, disproportionate to the crime or failing to serve a penal purpose more effectively than a less severe punishment. In so stating, we do not mean to suggest that these new penal provisions are without troublesome aspects. They are not. Several deserve mention. First and foremost is the failure to distinguish between the person who is diseased (i.e., the addict) from the nonaddict peddler. This law mandates a maximum term of imprisonment for life without regard to whether the particular offender is an addict or a nonaddict. The *mens rea* of the addict-peddler and the nonaddict seller are perhaps the same but their purposes are plainly different. Under this statute they are treated alike for purposes of punishment. The justification for similar treatment is found in the fact that the sale of heroin is a heinous crime, an essentially violent act, per se, which wreaks havoc upon the lives of addicts, their families and its ultimate victim, society. It may be argued that it should be considered a crime as serious as murder because it condemns the addict to a life more horrendous than death. It is these considerations which make it appropriate to treat the sale of heroin as a class A felony regardless of

who commits the crime. It is well-settled law that a legislative distinction will not be set aside if any state of facts reasonably justifies it (*McGowan v. Maryland*, 366 U. S. 420).

Further, the lifetime parole aspect is troublesome because once released from prison the defendant is still subject to a perpetual limitation of his liberty. According to the testimony of the State Commissioner of Corrections before the Codes Committee which drafted this statute, however, felons convicted of narcotics crimes had a 50% higher recidivist rate than other felons (Testimony of Commissioner Oswald, Public Hearing, Committee on Codes, Feb. 6, 1973). It has been further established, as former Governor Rockefeller stated, that after allocating over one billion dollars to the problem of drug addiction, "we have achieved very little permanent rehabilitation, and have found no cure" (State of State Message—January 3, 1973, reported in N. Y. L. J., Jan. 4, 1973, p. 4, col. 3). Faced with such a high recidivist rate and no known cure we cannot say that the Legislature acted without reasonable justification in providing for permanent supervision as support for the released offender and as necessary protection for the public.

CONCLUSION

Despite the myriad reports and studies emanating from governmental and private sources, it is still too soon to know for certain whether this statute will have the desired effect of helping in the solution of the drug problem in New York. More time needs to pass before that answer emerges. Subject to the test of such time, however, we conclude, as did the Second Department (*People v. Broadie*, 45 A D 2d 649, and the Third Department (*People v. Venable*, 46 A D 2d 73, decided Nov. 27, 1974), that chapters 276 to 278 of the Laws of 1973 meet the standards by which a statute, challenged as inflicting cruel and unusual punishment, is to be judged and that appellants have failed to prove this law unconstitutional beyond a reasonable doubt.

We have considered the other contentions raised in *McNair* and find them to be without merit.

Therefore, in *Mosely* the judgment insofar as it imposes sentence should be reversed and the matter remitted for resentencing; and the judgment in *McNair* should be affirmed.

MARSH, P. J., WITMER, SIMONS and GOLDMAN, JJ., concur.

Judgment in *People v. McNair* unanimously affirmed.

Judgment in *People v. Mosely* insofar as it imposes sentence unanimously reversed on the law and matter remitted to Monroe County Court for resentencing in accordance with opinion by CARDAMONE, J.

~~STATE DIVISION OF HUMAN RIGHTS, Petitioner, v. BOARD OF EDUCATION, OLEAN PUBLIC SCHOOLS, Respondent.~~

Fourth Department, January 28, 1975.

Civil rights—discrimination based on sex—maternity leave granted to probationary teacher should be treated as all other disabilities are treated in determining whether such leave should be credited toward tenure; determination without hearing that complainant was not discriminated against by refusal to grant her such credit was arbitrary and capricious; matter remitted for hearing—questions exist for hearing as to whether other teachers received tenure despite temporary nonmaternity illnesses—Commissioner of Education does not have exclusive jurisdiction in matter.

1. With respect to the question of whether maternity leave granted to a probationary school teacher should be credited toward the fulfillment of her probationary period, such leave should be treated as all other disabilities are treated. The determination without a hearing of the State Division of Human Rights that the complainant teacher was not discriminated against by reason of her sex when the board of education refused to grant her such credit toward tenure was arbitrary and capricious. The dismissal of her complaint in a summary fashion was tantamount to a determination that there was no merit thereto as a matter of law. Accordingly, the order of the State Human Rights Appeal Board affirming the determination of the division should be annulled and the matter remitted for a hearing.

2. Questions of fact exist as to whether other teachers have received tenure despite temporary nonmaternity illnesses resulting in absences for periods as long as that taken by complainant. Facts establishing the practices of the board of education in crediting such leave are critical to the question of discrimination and must be developed on the hearing.

3. The Commissioner of Education does not have exclusive jurisdiction in this matter.

PROCEEDING pursuant to section 298 of the Executive Law to review an order of the State Human Rights Appeal Board which affirmed an order of the State Division of Human Rights holding that complainant was not discriminated against by reason of sex.

Bernard F. Ashe (Emanuel Tabachnick of counsel), for petitioner.

Hodgson, Russ, Andrews, Wood & Goodyear (H. Kenneth Schroeder, Jr., of counsel), for respondent.

GOLDMAN, J. In this proceeding pursuant to section 298 of the Executive Law petitioner seeks review of an order of the Human Rights Appeal Board which affirmed by a 2 to 2 vote an order of the State Division holding that a pregnant probationary school

tion to add the two supplemental menacing counts only before the commencement of the trial and then only on according defendant the procedural protections specified in the statute. The record here fails to disclose any amendment prior to the commencement of the trial. A stipulation of counsel entered into the record after the commencement of the trial, however explicit, even as to the fact of an earlier off-the-record colloquy, falls short of the statutory prescription.

The order of the Appellate Term should be reversed, the judgment of conviction vacated, and the information dismissed.

Chief Judge BREITEL and Judges JASEN, GABRIELLI, WACHTER, ECHSBERG and COOKE concur.

Order reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v
IMOGENE BROADIE, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v
MILDRED JAMES, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v LARRY
C. MOSELY, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DORIS
MCNAIR, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v
ROBERTA FOWLER, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v
THEODORE PAUL, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v
ARTHUR LEE VENABLE, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v
ROLANDO MONTANE, Appellant.

Argued March 24, 1975; decided June 18, 1975

Crimes — dangerous drugs — cruel and unusual punishment — sections 220.40, 220.39 and 220.18, which classify crimes for which defendants were convicted as class A felonies and applicable sentencing provisions (Penal Law, § 70.00, subd 2, par [a]; subd 3, par [a], cls [ii], [iii]), imposing mandatory maximum term of life imprisonment and minimums of one or six to eight and

PEOPLE v BROADIE [37 NY2d 100]

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Statement of Case

one-third years for sales of drugs, are not so disproportionate to crime as to constitute cruel and unusual punishment; Legislature could reasonably conclude that drug trafficking was grave offense and threat to society, engendering violent crime, and that sentencing statutes, although severe and inflexible, would serve to isolate and deter; while drug offenses are more severely punished than other crimes in State and same crime in other States, narcotics laws are not irrationally severe.

Sections 220.40, 220.39 and 220.18, which classify the crimes for which the defendants were convicted as class A felonies and the applicable sentencing provisions (Penal Law, § 70.00, subd 2, par [a]; subd 3, par [a], cls [ii], [iii]), imposing a mandatory maximum term of imprisonment for life and minimums of one or six years to eight and one-third years for sales of drugs, are not so disproportionate to the crime as to constitute cruel and unusual punishment. The cruel and unusual punishment clause (NY Const, art I, § 5; US Const, 8th Amdt) is flexible, prohibiting gross disproportionality of punishment, a determination to which the gravity of the offense and the danger to society of the offender are decisive. Narcotics sales are symptomatic of a widespread phenomenon in which crimes of violence are engendered against law enforcement officers, drug traffickers themselves, addicts and the public. Facing a high recidivism rate in drug-related crimes and an inadequate response to less severe punishment, the Legislature could reasonably shift the emphasis from rehabilitation to isolation and deterrence. While the drug offenses are punished more severely and inflexibly than almost any other offense in the State and more severely than in any other jurisdiction, the punishments are not irrationally severe, given the dimensions of the problem.

People v Broadie, 45 AD2d 649, affirmed.

People v James, 46 AD2d 922, affirmed.

People v Mosely, 46 AD2d 476, affirmed.

People v McNair, 46 AD2d 476, affirmed.

People v Fowler, 46 AD2d 838, affirmed.

People v Paul, 46 AD2d 838, affirmed.

People v Venable, 46 AD2d 73, affirmed.

People v Montane, 46 AD2d 1014, affirmed.

APPEAL, in the first above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 18, 1974, which affirmed a sentence of the Supreme Court (MOSES M. WEINSTEIN, J.), imposed in Queens County, following defendant's conviction of criminal sale of a controlled substance in the third degree upon her plea of guilty, sentencing her to a term of imprisonment of one year to life.

APPEAL, in the second above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered December 30, 1974, which affirmed a judgment of the Supreme Court (MOSES M. WEIN-

STEIN, J.), rendered in Queens County, convicting defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree.

APPEAL, in the third above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered January 16, 1975, which (1) reversed, on the law, a sentence of the Monroe County Court (ANDREW G. CELLI, J.; opn 78 Misc 2d 736), imposed following defendant's conviction of criminal sale of a controlled substance in the third degree, upon his plea of guilty, sentencing him to a term of imprisonment of three to six years, and (2) remitted the matter for resentencing.

APPEAL, in the fourth above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered January 16, 1975, which affirmed a judgment of the Monroe County Court (EUGENE W. BERGIN, J.), rendered upon a verdict convicting defendant of criminal possession of a controlled substance in the second degree, criminal use of drug paraphernalia (two counts) and criminal possession of a hypodermic instrument.

APPEAL, in the fifth above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered December 9, 1974, which affirmed a judgment of the Albany County Court (JOHN J. CLYNE, J.), rendered upon a verdict convicting defendant of criminal sale of a controlled substance in the third degree.

APPEAL, in the sixth above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered December 9, 1974, which affirmed a judgment of the Albany County Court (JOHN J. CLYNE, J.), rendered upon verdicts convicting defendant of criminal sale of a controlled substance in the third degree (two counts).

APPEAL, in the seventh above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered December 9, 1974, which af-

firming a judgment of the Albany County Court (JOHN J. CLYNE, J.), rendered upon a verdict convicting defendant of criminal sale of a controlled substance in the third degree.

APPEAL, in the eighth above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered December 9, 1974, which affirmed a judgment of the Supreme Court (BUDD G. GOODMAN, J.), rendered in New York County, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the second degree.

Joseph Heller for appellant in the first above-entitled action. When a legislative body enacts a statute whereby a Judge is mandated to impose a sentence of one year to life without the right to exercise his discretion as to suspension or parole, does not such enactment constitute cruel and inhuman punishment in violation of the State and Federal Constitutions? (*People ex rel. Lobell v McDonnell*, 296 NY 109; *Osborne v Bank of U.S.*, 9 Wheat [22 US] 738; *Furman v Georgia*, 408 US 238; *Winston v United States*, 172 US 303; *Calton v Utah*, 130 US 83; *Andres v United States*, 333 US 740.)

Nicholas Ferraro, District Attorney (*Jenny M. Maiolo* of counsel), for respondent in the first above-entitled action. The provisions of section 220 of the Penal Law requiring a sentencing court to impose mandatory sentences does not constitute cruel and unusual punishment in violation of the State and Federal Constitutions. (*Gallego v United States*, 276 F2d 914; *United States v Halprin*, 295 F2d 458; *Flores v United States*, 238 F2d 758; *Wasmuth v Allen*, 14 NY2d 391; *I. L. F. Y. Co. v Temporary State Housing Rent Comm.*, 10 NY2d 263.)

Abraham Hecht for appellant in the second above-entitled action. I. A sentence of life imprisonment for selling any quantity of a narcotic drug is violative of the Eighth Amendment's as well as the New York State Constitution's prohibition against cruel and unusual punishment and is thus unconstitutional. (*Weems v United States*, 217 US 349; *Francis v Resweber*, 329 US 459; *Furman v Georgia*, 408 US 238; *Hart v Coiner*, 483 F2d 136; *Snider v Peyton*, 356 F2d 626; *People v Mosley*, 78 Misc 2d 736; *People v Broadie*, 45 AD2d 649; *People v Hollingsworth*, 79 Misc 2d 468.) II. The provisions of

CPL 220.10 (subd 6, par [a]) which prohibits any plea of guilty to a crime less than a class A felony is unconstitutional as violative of due process of law. (*Walters v City of St. Louis*, 347 US 231; *Williams v Rhodes*, 393 US 23; *Santobello v New York*, 404 US 257.)

Nicholas Ferraro, District Attorney (Jenny M. Maiolo of counsel), for respondent in the second above-entitled action. I. The provisions of article 220 of the Penal Law and the applicable sentencing provisions of article 70 of the Penal Law do not violate the State and Federal constitutional prohibitions against cruel and unusual punishment. (*Furman v Georgia*, 408 US 238; *Gallego v United States*, 276 F2d 914; *United States v Halprin*, 295 F2d 458; *Flores v United States*, 238 F2d 758; *Wasmuth v Allen*, 14 NY2d 391; *I. L. F. Y. Co. v Temporary State Housing Rent Comm.*, 10 NY2d 263.) II. The provisions of CPL 220.10 (subd 6, par [a]) do not violate the State and Federal Constitutions' equal protection and due process clauses. (*Newman v United States*, 382 F2d 479; *People v Selikoff*, 35 NY2d 227; *Oyler v Boles*, 368 US 448.)

Peter L. Yellin, Public Defender (Charles Steinman, Robert S. Beer and Leslie A. Bradshaw of counsel), for appellants in the third and fourth above-entitled actions. Mandatory life sentence and procedural restrictions for "sale" of narcotics denies equal protection and is cruel and unusual punishment.

Jack B. Lazarus, District Attorney (Melvin Bressler of counsel), for respondent in the third and fourth above-entitled actions. I. Defendant cannot overcome the fundamental burden of demonstrating, beyond a reasonable doubt, that the statutes in question are unconstitutional. (*Farrington v Pinckney*, 1 NY2d 74; *Nettleton Co. v Diamond*, 27 NY2d 182; *Lindsley v Natural Carbonic Gas Co.*, 220 US 61; *Matter of Fay*, 291 NY 198; *People v Pagnotta*, 25 NY2d 333.) II. An indeterminate sentence with a maximum of life imprisonment for drug sale or possession is not so disproportionate as to shock the conscience or otherwise require constitutional interference. (*Furman v Georgia*, 408 US 238; *Weems v United States*, 217 US 349; *People v Mosley*, 78 Misc 2d 736; *People v Pagnotta*, 25 NY2d 333.) III. The Legislature had the right and the duty to make the drug laws more effective; their enactments were within their authority and do not violate any constitutional rights. (*Day-Brite Light v Missouri*, 342 US 421; *People v Nebbia*, 262 NY 259.)

Daniel R. Santola and *Martin Brickman* for appellant in the fifth above-entitled action. I. Section 220.39 (subd 1) of the Penal Law requiring a mandatory maximum sentence of life imprisonment upon conviction under section 70.00 (subd 2, par [a]) is unconstitutional as being cruel and unusual punishment. (*Furman v Georgia*, 408 US 238; *People v Davis*, 33 NY2d 221; *Trop v Dulles*, 356 US 86; *Weenus v United States*, 217 US 349; *People v Oliver*, 1 NY2d 152; *Williams v New York*, 337 US 241.) II. CPL 220.10 (subd 6, par [a]) as applied to a charge of violating section 220.39 (subd 1) of the Penal Law violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. (*Griffin v Illinois*, 351 US 12; *Santobello v New York*, 404 US 257; *Williams v New York*, 337 US 241, 338 US 841; *United States ex rel. Privitera v Kross*, 239 F Supp 118; *People v Duell*, 1 NY2d 132.) III. Sections 220.39 (subd 1) and 70.00 (subd 2, par [a]) of the Penal Law, which deny judicial discretion in sentencing, violate the separation of governmental powers implicit in the Constitution and effectually denied appellant of a fair trial. (*People ex rel. Forsyth v Court of Sessions of Monroe County*, 141 NY 288; *Matter of La Guardia v Smith*, 288 NY 1; *People ex rel. Burby v Howland*, 155 NY 270; *Williams v New York*, 337 US 241, 338 US 841.) IV. The trial court erred in permitting the District Attorney to go beyond the scope of direct examination in questioning Loretta Kinzer during the defense presentation. (*Wills v Russell*, 100 US 621.) V. The refusal of the Trial Judge to instruct the jury as to the defense of agency was error. (*People v Sands*, 25 AD2d 785; *People v Lindsey*, 16 AD2d 805; *People v Buster*, 286 App Div 1141; *People v Pasquarello*, 282 App Div 405, 306 NY 759; *United States v Sawyer*, 210 F2d 169.) VI. The court committed prejudicial error in not suppressing the in-court identification of defendant and in admitting a photograph in evidence. VII. The State's action in aiding a material witness to leave the Jurisdiction deprived defendant of a fair trial. (*Hernandez v Nelson*, 298 F Supp 682, 411 F2d 619; *Velarde-Villarreal v United States*, 354 F2d 9; *People v Bennett*, 75 Misc 2d 1040; *Dennis v United States*, 384 US 855; *Brady v Maryland*, 373 US 83; *United States v Wilkins*, 326 F2d 135; *Barbee v Warden, Md. Penitentiary*, 331 F2d 842; *Evans v Kropp*, 254 F Supp 218; *People v Matera*, 52 Misc 2d 674.) VIII. The court below erroneously misconstrued portions of the record in arriving at its affirmance of defendant's conviction.

Sol Greenberg, District Attorney (Peter L. Rupert of counsel), for respondent in the fifth above-entitled action. I. The sentence authorized by section 220.30 (subd 1) of the Penal Law is not so disproportionate to the offense to constitute a cruel and unusual punishment. (*Weems v United States*, 217 US 349; *Francis v Resweber*, 392 US 459; *People v Mauceri*, 14 AD2d 479; *People v Davis*, 33 NY2d 221; *Farrington v Pinckney*, 1 NY2d 74; *People v Kaganovitch*, 1 AD2d 680; *People v Venable*, 46 AD2d 73; *People v McNair*, 46 AD2d 476.) II. CPL 220.10 (subd 6, par [a]) does not violate equal protection or due process by limiting plea bargaining. (*Santobello v New York*, 404 US 257; *People v Selikoff*, 35 NY2d 227; *Newman v United States*, 382 F2d 479.) III. Section 70.00 (subd 2, par [a]) does not interfere with the constitutional doctrine of separation of powers. (*People v Friedman*, 302 NY 75; *Lawton v Steele*, 119 NY 226.) IV. There was no error committed by the court below in regard to the testimony of Loretta Kinszer. (*People v Koerner*, 154 NY 355; *People v Ferrone*, 204 NY 551; *People v Reaves*, 30 AD2d 828, 26 NY2d 921; *People v Price*, 35 AD2d 1015.) V. There was no error by the trial court in the failure to charge the defense of agency. (*People v Jamison*, 29 AD2d 973; *People v Lindsey*, 16 AD2d 805.) VI. There was no error in the refusal of the court below to suppress the in-court identification of James W. Werthmuller. (*People v Miller*, 43 AD2d 605; *People v Rivera*, 28 AD2d 687, 22 NY2d 453; *People v Iglesias*, 40 AD2d 778.) VII. Defendant was not deprived of a fair trial. (*People v Vaughn*, 35 AD2d 889; *People v Goggins*, 34 NY2d 163.)

Michael G. Breslin for appellant in the sixth above-entitled action. I. The trial court's refusal to grant a continuance to allow Daniel Jerome Powell to be brought from Georgia to Albany to be a witness for defendant was an abuse of discretion. (*People v Gordon*, 262 App Div 534; *People v Vincent*, 34 AD2d 705, 27 NY2d 964; *People v Foy*, 32 NY2d 473; *People v Matz*, 23 NY2d 196; *People v Snyder*, 297 NY 81; *People v O'Dell*, 266 App Div 822; *People v Torre*, 33 AD2d 43; *People v McLaughlin*, 291 NY 480.) II. The court's refusal to direct the District Attorney to produce Powell, as requested by defendant, was a denial of due process which deprived defendant of a fair trial. (*Hernandez v Nelson*, 298 F Supp 682, 411 F2d 619; *People v Willis*, 41 AD2d 660; *Brady v Maryland*, 373 US 83; *People v Stridiron*, 33 NY2d 287; *People v Vaughn*, 35 AD2d 889.) III. The court deprived defendant of the right to cross-

examine Trooper Werthmuller and State Police Investigator Elliott on a material and relevant issue of fact. (*People v Ramistella*, 306 NY 379.) IV. The prosecution failed to introduce evidence as to a crucial element of the offense charged. (*People v Sansalone*, 208 Misc 491; *People v Connelly*, 35 NY2d 171; *People v Peluso*, 29 NY2d 605.) V. The District Attorney's characterization of defendant as an informant unworthy of belief introduced character as an issue and deprived defendant of a fair trial. (*People v Hetenyi*, 304 NY 80; *People v Lombard*, 4 AD2d 666; *People v Adams*, 21 NY2d 397; *People v Feldt*, 26 AD2d 743, 22 NY2d 839.) VI. The application of the mandatory aspects of the New York State Drug Law (Penal Law and CPL) to appellant constitutes cruel and unusual punishment as prohibited by the Constitutions of the United States and the State of New York. (*Robinson v California*, 370 US 660; *People v Davis*, 33 NY2d 221; *Trop v Dulles*, 356 US 86; *Weems v United States*, 217 US 349; *Goss v Bomar*, 337 F2d 341; *People v Venable*, 46 AD2d 73; *Furman v Georgia*, 408 US 238; *People v Washington*, 264 NY 335; *People v Adams*, 176 NY 351.) VII. The two consecutive sentences of seven years to life were excessive.

Sol Greenberg, District Attorney (Peter L. Rupert of counsel), for respondent in the sixth above-entitled action. I. There was no error by the trial court in refusing to grant an adjournment after jury selection. (*People v Jackson*, 111 NY 362; *People v McLaughlin*, 291 NY 480; *People v Foy*, 32 NY2d 473.) II. Defendant was not deprived of a fair trial. (*People v Vaughn*, 35 AD2d 889; *People v Goggins*, 34 NY2d 163.) III. There was no error by the trial court in regard to the scope of appellant's cross-examination of the witnesses of the People. IV. The evidence of narcotics was properly admitted at trial. (*People v Connelly*, 35 NY2d 171; *People v Jamison*, 29 AD2d 973; *People v Leshner*, 32 NY2d 883.) V. There was no error in regard to the summation of the People. VI. The sentence authorized by section 220.30 (subd 1) of the Penal Law is not so disproportionate to the offense to constitute a cruel and unusual punishment. (*Furman v Georgia*, 408 US 238; *Francis v Resweber*, 329 US 459; *Weems v United States*, 217 US 349; *People v Davis*, 33 NY2d 221; *People v Mauceri*, 14 AD2d 479; *Wasmuth v Allen*, 14 NY2d 391.) VII. The sentences imposed are not harsh and excessive. (*People v Paul*, 46 AD2d 838; *People v Speiser*, 277 NY 342.)

Mark C. Morril, Daniel G. Moriarty, Elizabeth B. DuBois, Margaret K. Brooks and Risa G. Dickstein for appellant in the seventh above-entitled action. I. The judgment of conviction rendered herein is unlawful in that upon learning of the jury's inability to agree on a verdict the trial court proceeded improperly and in violation of the Criminal Procedure Law and the Constitutions of the State of New York and the United States. (*Duncan v Louisiana*, 391 US 145; *Gideon v Wainwright*, 372 US 335; *Allen v United States*, 164 US 492; *United States v Flannery*, 451 F2d 880; *People v Faber*, 199 NY 256; *Jenkins v United States*, 380 US 445; *United States v Harris*, 391 F2d 348.) II. The judgment of conviction rendered herein is unlawful in that its disproportionality to the facts proven renders it cruel and unusual punishment in violation of the Constitutions of the State of New York and the United States. (*People v Davis*, 33 NY2d 221; *People v Saffore*, 18 NY2d 101; *Weems v United States*, 217 US 349; *Trop v Dulles*, 356 US 86; *People v Mosley*, 78 Misc 2d 736; *People v Pinckney*, 38 AD2d 217, 32 NY2d 749; *People ex rel. Prisament v Brophy*, 287 NY 132; *Williams v State of New York*, 18 NY2d 481.) III. The imposition of lifetime parole solely on persons convicted of class A drug law felonies violates the prohibition against cruel and unusual punishment and denies to appellant the equal protection and due process of law. (*People v Randazzo*, 37 Misc 2d 80; *People v Ronald W. (Anonymous)*, 24 NY2d 732; *People ex rel. Calloway v Skinner*, 33 NY2d 23; *Weems v United States*, 217 US 349; *Trop v Dulles*, 356 US 86; *Furman v Georgia*, 408 US 238; *Hart v Coiner*, 483 F2d 136, 415 US 938; *Jackson v Godwin*, 400 F2d 529; *Sobell v Reed*, 327 F Supp 1294.)

Sol Greenberg, District Attorney (Peter L. Rupert of counsel), for respondent in the seventh above-entitled action. I. There was no error in regard to the trial court's charge to the jury. (*People v Presley*, 22 AD2d 151; *People v Campanaro*, 223 App Div 248; *People v Randall*, 9 NY2d 413; *People v Josey*, 19 AD2d 660.) II. The sentence authorized by section 220.00 (subd 1) of the Penal Law is not so disproportionate to the offense to constitute a cruel and unusual punishment. (*Furman v Georgia*, 408 US 238; *Francis v Resweber*, 329 US 459; *Weems v United States*, 217 US 349; *People v Davis*, 33 NY2d 221; *People v Mauceri*, 14 AD2d 479; *Wasmuth v Allen*, 14 NY2d 391.) III. The issue of the constitutionality of section 212 (subd 8) of the Correction Law is not raised by appellant's

appeal from his judgment of conviction, but it is constitutional.

Edward Gasthalter for appellant in the eighth above-entitled action. I. Section 220.00 of the Penal Law and more particularly section 220.41, thereof, to which defendant-appellant pleaded guilty, violated his constitutional rights to equal protection of the law, due process of law and freedom from cruel and unusual punishments. (*United States ex rel. Daneff v Henderson*, 501 F2d 1180; *United States ex rel. Newsome v Malcolm*, 492 F2d 1166; *Gesicki v Oswald*, 336 F Supp 371; *Johnson v Zerbst*, 304 US 458; *Barker v Wingo*, 407 US 514; *Baker v Carr*, 369 US 186; *Royster Guano Co. v Virginia*, 253 US 412; *Walters v City of St. Louis*, 347 US 231; *Moore v Missouri*, 159 US 673; *McLaughlin v Florida*, 379 US 184.)

Robert M. Morgenthau, District Attorney (T. James Bryan and *Peter Zimroth* of counsel), for respondent in the eighth above-entitled action. I. Appellant has no standing to attack the constitutionality of the "aggregate weight" scheme. (*United States v Raines*, 362 US 17; *People v Merolla*, 9 NY2d 62; *Matter of Farrell v Drew*, 19 NY2d 486.) II. The "aggregate weight" scheme of the drug laws is rational as applied to cocaine. (*McDonald v Board of Election*, 394 US 802; *Oriental Blvd. v Heller*, 27 NY2d 212; *People v Daneff*, 37 AD2d 918, 30 NY2d 793, 31 NY2d 667, 410 US 913, cert den sub nom. *United States ex rel. Daneff v Henderson*, 501 F2d 1180.)

Louis J. Lefkowitz, Attorney-General (*Peter J. Dooley*, *Ruth Kessler Toch*, *Samuel Hirshowitz* and *David R. Spiegel* of counsel), in his statutory capacity under section 71 of the Executive Law. I. The challenged statutes are in all respects, constitutional and valid. The punishments prescribed therein are not cruel and unusual in violation of the State and Federal Constitutions. (*Pennsylvania v Ashe*, 302 US 51; *People v Harvey*, 307 NY 588; *People v Grant*, 242 App Div 310, 267 NY 508; *Barker v People*, 3 Cow 686; *Robinson v California*, 370 US 660; *Whipple v Martinson*, 256 US 41; *Zorach v Clauson*, 303 NY 161, 343 US 306; *Wasmuth v Allen*, 14 NY2d 391; *Wiggins v Town of Somers*, 4 NY2d 215; *Lindsley v Natural Carbonic Gas Co.*, 220 US 61.) II. The challenged statutes do not violate the State and Federal Constitutions' equal protection and due process clauses. (*Newman v United States*, 382 F2d 479; *People v Selikoff*, 35 NY2d 227; *Dandridge v Williams*, 397 US 471; *People v Daneff*, 37 AD2d 918,

30 NY2d 793, 31 NY2d 667, 410 US 913, cert den *sub nom. United States ex rel. Daneff v Henderson*, 501 F2d 1180; *Oregon v Mitchell*, 400 US 112; *McDonald v Board of Election*, 394 US 802.)

Chief Judge BREITEL. Eight defendants, convicted of drug offenses, in separate appeals challenge the constitutionality of statutes classifying the crimes for which they were convicted as class A felonies, the highest rank of crime in this State (Penal Law, §§ 220.40, 220.39, 220.18). They also challenge the applicable sentencing provisions imposing a mandatory maximum sentence of life imprisonment and minimums from one or six years to eight and one-third years (Penal Law, § 70.00, subd 2, par [a]; subd 3, par [a], cls [ii], [iii]; for a compilation and analysis of the drug statutes see, generally, Rosenblatt, New York's New Drug Laws and Sentencing Statutes). In each case, the Appellate Division sustained the statutes as constitutional.

Six defendants were convicted of one or two felonious "street" sales of heroin or cocaine. Two, however, were convicted of more serious offenses, sale of one-eighth ounce or more of cocaine, and possession of one ounce or more of heroin.

The principal issue is whether the so-called "drug" laws, in mandating life imprisonment and, therefore, lifetime parole on parole release, prescribe sentences so disproportionate as would constitute cruel and unusual punishment in violation of constitutional limitations (NY Const, art I, § 5; US Const, 8th Amdt). Of course, defendants in these cases are not being punished for their status as addicts but for the offenses they have committed, however impelled by their "drug dependency", if that were the cause of their criminal acts (cf. *Robinson v California*, 370 US 660, 667; *People v Davis*, 33 NY2d 221, 226). In a deterministic sense, all criminals commit the crimes they do because they "must".

There should be an affirmance. The sentences are not grossly disproportionate in constitutional analysis. The Legislature may distinguish among the ills of society which require a criminal sanction, and prescribe, as it reasonably views them, punishments appropriate to each. Thus, while the courts possess the power to strike down punishments as violative of constitutional limitations, the power must be exercised with especial restraint. However disproportionality

is measured, the instant sentences do not rise to the gross disproportionality violative of constitutional limitations. The constitutional equal protection (NY Const, art I, § 11; US Const, 14th Amdt) arguments of appellants are not separately discussed because the same reasoning which supports the concededly and intendedly severe sentences, especially with regard to deterrence, would sustain, if valid, a reasonable classification between defendants in drug cases and in other cases.

The cruel and unusual punishments clause is a flexible one with a long historical development (see Appendix attached to this opinion). Although the intent of the framers was to proscribe barbaric, torturous punishments, the clause has come to mean much more. Prohibited also are punishments grossly disproportionate to the crime. In considering punishments the maximums must be examined, whether they be for long or lifetime imprisonment or for long or lifetime parole (see *Matter of Lynch*, 8 Cal 3d 410, 419).

No punishment in this State has ever been struck down as unconstitutionally disproportionate to its crime. Courts of this State have nevertheless recognized the principle of gross disproportionality (see *People v Davis*, 33 NY2d 221, 226, *supra*; *Matter of Bayard*, 25 Hun 546, 549). Elsewhere, even in the United States Supreme Court, this principle has been considered applicable, and, in some instances, has been used to overturn statutory punishments (see *Weems v United States*, 217 US 349; *Hart v Cooner*, 483 F2d 136, cert den 415 US 938; *Ralph v Warden*, 438 F2d 786, cert den 408 US 942; *Matter of Foss*, 10 Cal 3d 910; *Matter of Lynch*, 8 Cal 3d 410, 423, n 13, *supra*, and cases cited; *People v Lorentzen*, 387 Mich 167). Given the flexibility of the cruel and unusual punishment clause, and the persuasive, if not circular, logic of the assertion that grossly disproportionate punishments are "cruel and unusual", the applicability of the principle is here accepted.

Apart from a subjective evaluation which looks to the extent to which the conscience of the court is shocked by punishments imposed, there have developed standards to determine whether punishments are constitutionally disproportionate. Because such a subjective test has obvious weaknesses in trying to apply a rational analysis, although often used by such of the courts which have applied or discussed the cruel and unusual punishments clause, there will be no discussion

of it (see, e.g., *Wilkinson v Skinner*, 34 NY2d 53, 59-60; *Matter of Lynch*, 8 Cal 3d 410, 424, *supra*; but cf., e.g., *Matter of Pell v Board of Educ. of Union Free School Dist No. 1 of Towns of Scarsdale & Mamaroneck*, 34 NY2d 222, 233-235; *Rochin v California*, 342 US 165, 175-176 [BLACK, J., concurring]).

The gravity of the offense is obviously key, as is the gravity of the danger which the offender poses to society. Given grave offenses committed or committable by dangerous offenders, the penological purposes of the sentencing statutes, whether they be the rehabilitation or isolation of offenders or the deterrence of potential offenders, will be decisive (see *Weems v United States*, 217 US 349, 365, *supra*; *O'Neil v Vermont*, 144 US 323, 337-341 [dissenting opn]; *Hart v Coiner*, 483 F2d 136, 141, cert den 415 US 938, *supra*; *Matter of Foss*, 10 Cal 3d 910, 919-920, *supra*; *Matter of Lynch*, 8 Cal 3d 410, 425, *supra*; *Faulkner v State*, 445 P2d 815, 818-819 [Alaska]).

In considering these factors, it will be useful, and will follow precedential doctrine, to compare the challenged punishments with those prescribed in the same jurisdiction for other offenses and also with punishments for the same or similar offenses prescribed in other jurisdictions (see, e.g., *Weems v United States*, 217 US 349, 377, 380-381, *supra*; *Hart v Coiner*, 483 F2d 136, 141-142, cert den 415 US 938, *supra*; *Ralph v Warden*, 438 F2d 786, 791-792, cert den 408 US 942, *supra*; *Matter of Lynch*, 8 Cal 3d 410, 426-428, *supra*; *People v Lorentzen*, 387 Mich 167, 177-179, *supra*).

In assessing the gravity of a criminal offense, the primary consideration is the harm it causes to society. The Legislature, in making this assessment, could properly view criminal narcotics sales not as a series of isolated transactions, but as symptoms of the widespread and pernicious phenomenon of drug distribution. Social harm in drug distribution is great indeed. The drug seller, at every level of distribution, is at the root of the pervasive cycle of destructive drug abuse (see, generally, President's Comm. on Law Enforcement and the Administration of Justice, Task Force on Narcotics and Drug Abuse [1967], p 7).

Defendants would minimize drug trafficking by arguing that it is not a crime of violence. Because of their illegal occupation, however, drug traffickers do often commit crimes of violence against law enforcement officers and, because of the high stakes, engage in crimes of violence among themselves.

(see, e.g., *People v Medina*, 47 AD2d 717 [two drug pushers, upon learning of a dealer's plot to have one kill the other, kill the dealer]).

More significant, of course, are the crimes which drug traffickers engender in others. The seller often introduces the future addict to narcotics. The addict, to meet the seller's price, often turns to crime to "feed" his habit. Narcotics addicts not only account for a sizable percentage of crimes against property; they commit a significant number of crimes of violence as well (see Task Force on Narcotics and Drug Abuse, *op. cit.*, pp 10-11; Second Report of the National Comm. on Marijuana and Drug Abuse, *Drug Use in America: Problem in Perspective*, p 165; see, generally, Greenberg and Adler, *Crime and Addiction: An Empirical Analysis of the Literature, 1920-1973*, 3 *Contemporary Drug Problems* 221).

Thus the Legislature could reasonably have found that drug trafficking is a generator of collateral crime, even violent crime. And violent crime is not, of course, the only destroyer of men and the social fabric. Drug addiction degrades and impoverishes those whom it enslaves. This debilitation of men, as well as the disruption of their families, the Legislature could also lay at the door of the drug traffickers (see, generally, Interim Report of the Temporary State Comm. to Evaluate the Drug Laws, NY Legis Doc, 1972, No. 10, p 58).

Measured thus by the harm it inflicts upon the addict, and, through him, upon society as a whole, drug dealing in its present epidemic proportions is a grave offense of high rank.

A second consideration, in assessing the proportionality of the punishment to the crime, is the character of the offender and the gravity of the threat he poses to society. None of the present cases involve what are often called "accidental" offenders. True, not all of these defendants are "hardened" criminals. In each case, however, defendant was convicted of at least "street" sales of heroin or cocaine, or possession of a large amount of narcotics, two of the situations to which the statutes were directed.

The legislative presumption that he who possesses a large amount of narcotics is a seller would also seem reasonable. Defendant McNair, who was arrested in premises that were a veritable heroin "factory" with over an ounce of the drug in her constructive possession, is hardly less culpable or dangerous than the appellants who made "street" sales.

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These eight defendants were actually or presumptively, then, at least narcotics sellers, not only under broad statutory definition, but in the narrower, literal sense as well. As sellers, they cannot disclaim their roles in the scourge of drug distribution. The Legislature might reasonably deem the threat posed to society by each of these defendants a grave one indeed.

The penological purposes, conceived by the Legislature as justifying the elimination of discretionary, individualized sentencing in favor of inflexible maximum lifetime sentences, are additional factors to be considered in measuring disproportionality.

Defendants argue that the new sanctions neither favor, nor presume much likelihood of, their future rehabilitation. True, the elimination of discretionary sentencing, and the substitution of inflexible maximum sentences have been often tried and as often abandoned as "remedies". Equally true, there is considerable highly-respected authority which questions the wisdom of eliminating flexible sentencing standards in drug cases in favor of long, mandatory prison terms (see, e.g., Task Force on Narcotics and Drug Abuse, *op. cit.*, pp 11-12; cf. *Furman v Georgia*, 408 US 238, 402-403 [BURGER, C. J., dissenting]).

Rehabilitation, however, is only one of the recognized purposes of penal sanctions (see *People v Oliver*, 1 NY2d 152, 160). At the same time, put aside as factors are motives of retribution or stimulus to vigilantism which sometimes may avowedly or unconsciously motivate the use of criminal sanctions. Faced with what it found to be a high recidivism rate in drug-related crimes, an inadequate response to less severe punishment, and an insidiously growing drug abuse problem, the Legislature could reasonably shift the emphasis to other penological purposes, namely, isolation and deterrence.

The reasons for isolating drug traffickers have already been suggested. The Legislature could find that narcotics sellers were the crucial link in the pernicious cycle of drug abuse; that sellers spawn addiction, and that addicts, in turn, may become sellers. As a minimal proposition, the seller, in feeding the addict's habit, frustrates rehabilitation. The Legislature could conclude that the best way to break the chain would be to remove the seller from society for a long duration, and, upon his return, to continue surveillance through lifetime parole.

Deterrence is the other obvious purpose. It was thought that rehabilitation efforts had failed; that the epidemic of drug abuse could be quelled only by the threat of inflexible, and therefore certain, exceptionally severe punishment (see Annual Message of Governor Rockefeller, McKinney's 1973 Session Laws of NY, vol 2, pp 2317-2318; see, also, *People v Davis*, 33 NY2d 221, 228, *supra*; Hechtman, Supplementary Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law, art 220, p 6 [1974-1975 Pocket Part]; for a history of the drug abuse problem in New York and the legislative response see Hardt and Brooks, Social Policy on Dangerous Drugs: A Study of Changing Attitudes in New York and Overseas, 48 St John's L Rev 48; see, generally, *United States v Moore*, 486 F2d 1139, 1215-1229 [WRIGHT, J., dissenting]; Brecher and the Editors of Consumer Reports, Licit and Illicit Drugs, pp 42-59). Thus, to achieve the deterrence, so far seemingly elusive, the would-be drug trafficker had to be put on notice that, should he be caught, his fate was sealed regardless of his position in the hierarchy of distribution and regardless of the quantity of drugs in which he dealt.

The deterrence principle may not, of course, be applied absolutely. Littering or speeding, for example, would certainly be diminished by the threat of severe punishments, but they are relatively minor offenses to which penalties of the kind imposed for the drug offenses would be readily recognized as grossly disproportionate. Drug trafficking, on the other hand, is hardly, on any view, a minor offense.

Whether the sentences are grossly disproportionate is measurable by comparison with punishments imposed for other crimes within this State, as well as with punishments imposed for the same or similar crimes in other jurisdictions.

The drug offenses, concededly, are punished more severely and inflexibly than almost any other offense in the State. Only for murder in the first degree is a greater penalty, capital punishment, prescribed by statute (Penal Law, § 125.27). Only arson in the first degree (Penal Law, § 150.20 [causing an explosion in an occupied building]); kidnapping in the first degree (Penal Law, § 135.25); and murder in the second degree (Penal Law, § 125.25) carry the same mandatory life terms. Even a persistent (third) felony offender will be subject to a mandatory life sentence only under special circumstances (see Penal Law, § 70.10, subd 2).

Among class A felonies, the narcotics offenses alone may not

be reduced below the class A-III level by plea negotiations (CPL 220.10, subd 6, par [a]). Among class A felony offenders, only those convicted of sale or possession of narcotics are barred from being absolutely discharged from their sentences after five years' unrevoked parole (Correction Law, § 212, subd 8). Ranked lower than the drug offenses as B felonies carrying a discretionary maximum sentence of 25 years and no minimum sentence, are such serious crimes as manslaughter, kidnapping in the second degree, rape, robbery, and setting fire to an occupied building (see Penal Law, § 70.00, subd 2, par [b]).¹

Drug trafficking, on the other hand, is a very serious offense itself. As already discussed, it generates collateral crimes, even violent crimes. Moreover, drug-related crimes may be much more prevalent, that is, have a higher and rising incidence, than other crimes comparably punished or equally grave crimes not as severely punished, requiring greater isolation and deterrence.

In comparison with other jurisdictions, drug trafficking is punished more severely in this State than in other jurisdictions (see Corcoran and Helm, *Compilation and Analysis of Criminal Drug Laws in the 50 States and Five Territories*, in *Drug Use in America*, *op. cit.*, App, vol 3, pp 240-334, especially pp 293-295). It is also true, however, that drug trafficking is more extensive in New York (see, generally, Brecher, *op. cit.*, p 72 [over half the addict population in the Nation is located in New York City]; Task Force on Narcotics and Drug Abuse, *op. cit.*, p 11). Significantly, California, with a similar drug problem, punishes drug trafficking almost as severely as New York (see Cal Health and Safety Code, § 11352; but cf. *Matter of Foss*, 10 Cal 3d 910, *supra*). That the harsh penalties for drug trafficking were prescribed in response to a more prevalent crime problem must be weighed in any "external" comparison.

Summarizing the various factors and comparisons pertinent

1. The B felonies include arson in the second degree (Penal Law, § 150.15 [causing a fire in an occupied building]); bribery and bribe receiving in the first degree (Penal Law, §§ 200.04, 200.12); burglary in the first degree (Penal Law, § 140.30); conspiracy in the first degree (Penal Law, § 105.15); criminal mischief in the first degree (Penal Law, § 145.12); kidnapping in the second degree (Penal Law, § 135.20); manslaughter in the first degree (Penal Law, § 125.20); rape in the first degree (Penal Law, § 130.35); robbery in the first degree (Penal Law, § 160.15); sodomy in the first degree (Penal Law, § 130.50); and possession of explosives with intent to use unlawfully against the person or property of another (Penal Law, § 265.05, subd 7).

to gross disproportionality, the Legislature could reasonably conclude that drug trafficking was a grave offense; that the defendants, as sellers, posed a serious threat to society; and that the sentencing statutes, though severe and inflexible, would serve, at least, to isolate and deter. Compared both "internally", to punishments for other crimes under the Penal Law, and "externally", to punishments imposed elsewhere for the same or similar offenses, the narcotics laws are relatively severe, but not irrationally so, given the epidemic dimensions of the problem.

On this analysis, the punishments in these cases were not so grossly disproportionate that they may be declared unconstitutional. The Legislature has latitude in determining which ills of society require criminal sanctions, and in imposing, as it reasonably views them, punishments, even mandatory ones, appropriate to each (see, e.g., *People ex rel. Prisament v Brophy*, 287 NY 132, 136, cert den 317 US 625; *Matter of Dodd v Martin*, 248 NY 394, 398-399; *People v Gowasky*, 244 NY 451, 466). That courts may believe that the Legislature is mistaken, does not lessen the legislative power. The statutes were enacted after thorough investigation (see Official Transcripts, Senate and Assembly Committees on Codes, Jan., Feb., 1973; Official Transcripts, Senate Debate on Drug Bills [S6204, S6205, A7328, A7873], April, May, 1973; Official Transcripts, Assembly Debate on Drug Bills, May, 1973; see, generally, 1973 Annual Report of the Assembly Codes Committee, pp 3-7; "Questions [to] and Answers [of]" Governor Rockefeller Following Testimony at Joint Hearing of Senate and Assembly Codes Committees [1973]; cf. Interim Report of the Temporary State Comm. to Evaluate the Drug Laws, Drugs and Drug Penalties Under Review: A Documentary Study, NY Legis Doc, 1973, No. 13, pp 70-72). Rarely has a penal sanction been struck down by the courts of this State as unconstitutional under the cruel and unusual punishments clause, and never on the ground of disproportionality (see *People v Fitzpatrick*, 32 NY2d 499, 509-513 [under constraint of *Furman v Georgia*, 408 US 238, *supra*]). The strong presumption of constitutionality of statutes has not been rebutted (see *Weems v United States*, 217 US 349, 379, *supra*; *People v Pagnotta*, 25 NY2d 333, 337; *People v Crane*, 214 NY 154, 173, affd 239 US 195; *People v Gillson*, 109 NY 389, 398).

In so holding, in the exercise of judicial restraint and with respect for the separation of powers, the court does not

necessarily approve or concur in the Legislature's judgment in adopting these sanctions. Their pragmatic value might well be questioned, since more than a half century of increasingly severe sanctions has failed to stem, if indeed it has not caused, a parallel crescendo of drug abuse. The premises upon which the Legislature has proceeded have been subjected to vigorous dispute (see, e.g., *United States v Moore*, 486 F2d 1139, 1243-1246 [WRIGHT, J., dissenting], *supra*; Report of the President's Advisory Comm. on Narcotic and Drug Abuse, pp 3, 40; Drug Use in America, *op. cit.*, pp 250-251; Rosenthal, Proposals for Dangerous Drug Legislation, Task Force on Narcotics and Drug Abuse, *op. cit.*, pp 80, 103; Chambliss, Types of Deviance and the Effectiveness of Legal Sanctions, 1967 Wis L Rev 703, 707-708; Frankel, Narcotic Addiction, Criminal Responsibility and Civil Commitment, 1966 Utah L Rev 581, 587-588). Indeed, the debate moves beyond the wisdom of substituting long mandatory prison terms in place of flexible sentencing, of emphasizing isolation and deterrence over rehabilitation. Even the questions whether "the policy of criminalization, which raises the cost and increases the difficulty of obtaining drugs, does in fact make the drug user a proselytizer of others in order that he may obtain the funds to acquire his own drugs", and whether "the compulsion of the addict to obtain drugs and the moneys to purchase them causes him to commit collateral crime that otherwise he might not commit", are questions about which reasonable men can and do differ (see Additional Views to the Report by the President's Comm. on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society, pp 302-303 [Dr. Brewster, Judge BREITEL, Mrs. Stewart and Mr. Young]; Drug Use in America, *op. cit.*, pp 170-173; Tinklenberg, Drugs and Crime, App, vol I, pp 242, 270; see, generally, Greenberg and Adler, 3 Contemporary Drug Problems, p 229). Given the present state of criminological knowledge, perhaps only time will tell whether the course pursued will prove effective or will fail as every similar effort since the Harrison Act of 1914 has failed.

The court thus does not pass on the wisdom of the Legislature's acts. It holds only that, because of the Legislature's rational view of the gravity of the offenses, the danger posed by the offenders, and the penological purposes to be served, the punishments imposed for these crimes in the present state of man's knowledge were not grossly disproportionate or cruel

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and unusual in the constitutional sense.² Again, the appellants and their offenses not only technically fit the statutory definition of the offender class, but are also encompassed by legitimate penological purposes as envisioned by the Legislature. This is not to say that in some rare case on its particular facts it may not be found that the statutes have been unconstitutionally applied (cf. *Furman v Georgia*, 408 US 238, 460-461 [POWELL, J., dissenting]).

The other issues, including the alleged trial errors, raised by defendants, have been considered, but they do not require discussion.

Accordingly, the orders of the Appellate Divisions should be affirmed.

Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur.

In each case: Order affirmed.

APPENDIX

The Cruel and Unusual Punishments Clause

The origins of the Federal constitutional provision have received extensive inquiry (see, e.g., *Furman v Georgia*, 408 US 238, 316-322 [MARSHALL, J., concurring]; *People v Davis*, 33 NY2d 211, 225-226; *People ex rel. Kemmler v Durston*, 119 NY 569, 576, affd 136 US 436; see, generally, Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Cal L Rev 839).

The first use of the phrase "cruel and unusual punishments" appeared in the English Declaration of Rights of 1688 (see 2 Story, *Commentaries on the Constitution of the United States*, § 1903, p 623 [4th ed, 1873]; Hallam, *Constitutional History of England*, pp 547-549; Granucci, pp 852-855). The Convention Parliament, reacting to the "illegal and cruel punishments" inflicted during the reign of James II, included in the Bill of Rights of 1689 a clause prohibiting "cruel and unusual punishments" to prevent a repetition by the new

2. Because the present analysis, and, for that matter, any legal analysis, is the product of history, attached as an Appendix to this opinion is a history of the cruel and unusual punishments clause in New York, and of its roots in Anglo-American common law and constitutional doctrine.

monarchs, William and Mary (1 W & M sess 2, ch 2, Preamble, cl 10; see Granucci, pp 852-859). There is also evidence that, by inclusion in the bill of the cruel and unusual punishments clause, Parliament intended to reiterate a long-standing English policy against disproportionate punishments (see p 860).

The language of the bill pertaining to cruel and unusual punishments was adopted by George Mason in his draft of the Declaration of Rights of the 1776 Constitution of Virginia, and in 1791 was incorporated with little debate into the Federal Constitution as part of the Eighth Amendment (see 7 Thorpe, Federal and State Constitutions, p 3813; Rutland, Birth of the Bill of Rights, 1776-1791, pp 35-36, 232; 1 Annals of Cong, p 754; see, generally, *Furman v Georgia*, 408 US 238, 312-322 [MARSHALL, J., concurring], *supra*). It is commonly accepted that in adopting the language of the English Bill of Rights and incorporating it in the Eighth Amendment, the framers intended primarily to prohibit torture and other barbaric punishments (see, e.g., *Furman v Georgia*, 408 US 238, 319 [MARSHALL, J., concurring], *supra*; pp 376-377 [BURGER, C. J., dissenting]; *People v Davis*, 33 NY2d 221, 226, *supra*; but see *Weems v United States*, 217 US 349, 371-373 ["But surely they (the framers) intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that"]; compare *Carlson v Landon*, 342 US 524, 557 [BLACK, J., dissenting]; see, generally, Wheeler, Toward a Theory of Limited Punishment II: The Eighth Amendment After *Furman v Georgia*, 25 Stan L Rev 62, 63, n 7, in which the author suggests that the framers may also have intended to prohibit disproportionate punishments).

Although an integral part of the common law of the State, incorporation of the prohibition of cruel and unusual punishments into this State's Constitution was a relatively late development. On the other hand, the Massachusetts Code of 1648 incorporated large sections of Nathaniel Ward's 1641 Body of Liberties, including clause 46 which read: "For bodilie punishments we allow none that are inhumane, barbarous, or cruel" (see 1 Schwartz, The Bill of Rights: A Documentary History, pp 71, 77; Perry, Sources of Our Liberties, p 153; Whitmore, Colonial Laws of Massachusetts, 1630-1686, p 8; Welford, The Laws and Liberties of 1648, 28 Boston U L Rev 426, 446).

The influence of the Massachusetts Code of 1648 throughout the colonies was great. Ward's ideas relating to cruel punishments, however, were not as influential as other sections of the code, and were not included in either the Connecticut Code of 1650 or the New Haven Code of 1656 (see Haskins & Ewing, *Spread of Massachusetts Law in the Seventeenth Century*, 106 U Pa L Rev 413, 415, n 23; 417, n 31). These codes were used as references by Richard Nicolls, Governor of the newly-conquered Colony of New York, to draft the "Duke's Laws" of 1665 (1 Colonial Laws of New York, pp 6-73; see Haskins & Ewing, p 417). It is not surprising, therefore, that the "Duke's Laws" contained no prohibition of torture and cruel punishments similar to that in the Massachusetts Code (see Granucci, p 861; see, generally, Note, *Law in Colonial New York: The Legal System of 1691*, 80 Harv L Rev 1757, 1758-1759). Nor did the New York Charter of Liberties and Privileges of 1683 proscribe cruel punishments (see 1 Colonial Laws of New York, ch 1, pp 111-112 [1st Colonial Assembly, passed Oct. 30, 1683]; see 1 Lincoln, *Constitutional History of New York*, pp 720-723).

Following the promulgation of the English Bill of Rights in 1689, the Colonial Assembly had opportunity to adopt the bill's prohibition against cruel and unusual punishments; but it did not (see "An Act declareing what are the Rights and Priviledges of their Majesties Subjects inhabiting within their Province of New York", in 1 Colonial Laws of New York, ch 10, pp 244-248 [passed May 13, 1691]). This may be because the English Bill of Rights was fully applicable in the colony, and, thus, statutory enactment may have been thought unnecessary (see 1 Lincoln, *op. cit.*, pp 726-727).

At the onset of the Revolution, on August 1, 1776, the Provincial Convention passed a resolution requiring the Committee on the Constitution to prepare a bill of rights "ascertaining and declaring the essential rights and privileges of the good people of this state" (see 1 Lincoln, *op. cit.*, p 490). Although a few propositions common to a bill of rights were included in the proposed Constitution, no formal bill of rights was ever reported by the committee (see 1 Lincoln, *op. cit.*, p 727). Thus, the first State Constitution of 1777 contained no reference to cruel and unusual punishments. It should be noted, however, that article 35 of the 1777 Constitution continued in force the common and statute law of England, subject to alteration by the Legislature, and, therefore, contin-

ued the English Bill of Rights, including the cruel and unusual punishments clause, as part of the law of New York.

The situation in the State remained unchanged until 1787. By then the Legislatures of six newly-independent States had passed constitutional or statutory prohibitions against cruel punishments (see Va Const, Declaration of Rights, § 9 [1776]; Md Const, §§ 14, 22 [1776]; Del Code Ann, Declaration of Rights of 1776, p 16; NC Const, § 10 [1776]; Mass Const, art 26 [1780]; NH Const, § 33 [1784]). In addition, two States had included in their Constitutions language requiring proportionality of punishments (see SC Const, § 40 [1778]; NH Const, § 18 [1784]). Perhaps inspired by the actions of sister States, the Legislature on January 26, 1787, passed as a statute the "Act Concerning the Rights and Citizens of this State", which has since been known as the New York Bill of Rights (L 1787, ch 1). Paragraph 8 of the bill, copied from article 10 of the English Bill of Rights, contains the first expression of the prohibition of cruel and unusual punishments in New York: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" (see 1 Lincoln, *op. cit.*, p 730). The clause was continued in the revisions of 1801, 1813 and in the revised statutes of 1828, by which the original act of 1787 was repealed (see, generally, 1 Lincoln, *op. cit.*, p 728).

Despite the statutory ban on cruel and unusual punishments, constitutional proscription remained 59 years away. A bill of rights was considered by the Constitutional Convention of 1821, but the proposed bill prepared by the Committee on the Bill of Rights made no reference to cruel and unusual punishments (see Report of the Debates and Proceedings of the Constitutional Convention of 1821, pp 102-103; see, also, Journal of the New York State Constitutional Convention of 1821, p 30). This omission is explained by reference to the remarks of Chief Justice AMBROSE SPENCER, who was chairman of the Committee on the Bill of Rights. The Chief Justice stated that he thought one proposed inclusion in the bill was "quite useless, that restraining from cruel and unnecessary punishments—now no punishment can be inflicted but by law—and if the Legislature pass laws inflicting punishment, the punishment whatever it be, will not be considered by them as cruel" (cf. 1 Annals of Cong, p 754 [remarks of Rep. Livermore]). In any event, the proposed bill of rights was not passed

by the Convention, apparently because it was thought unnecessary (see Proceedings and Debates, *op. cit.*, pp 171-173, 487).

It was not until 1846 that the prohibition of cruel and unusual punishments was to become a State constitutional limitation. At the Constitutional Convention of 1846, a bill of rights was prepared by the Committee on the Bill of Rights for inclusion in the new Constitution ("Report from the committee on the rights and privileges of the citizens of the State", in Bishop and Attree, Debates and Proceedings of the New York State Constitutional Convention of 1846, p 196). Contained in section 5 of the proposed bill was the cruel and unusual punishments clause as it reads today (NY Const, art I, § 5; see Bishop and Attree, *op. cit.*, p 196). The committee report indicates that the language of the clause was copied from the Eighth Amendment (see 1 Documents of the New York State Constitutional Convention of 1846, Doc No. 39, p 2). Accepted without debate, the section became a part of the new Constitution (see Croswell and Sutton, Debates and Proceedings in New York State Constitutional Convention of 1846, pp 417-419, especially p 429).

Thus, section 5 of article I of the State Constitution shares a common heritage with the Eighth Amendment. The fact that the constitutional prohibition did not occur until 1846 indicates, however, that there was little fear that the Legislature would ever enact a punishment which could be considered "cruel and unusual" (see *Barker v People*, 3 Cow 686, 701 [Court for the Correction of Errors, 1824]; cf., generally, 2 Story, *op. cit.*, § 1903, p 623). In this, New Yorkers did not seem to share the doubts expressed by some who were called upon to consider passage of the Eighth Amendment (see 2 Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution, p 111; vol 3, pp 446-448). Adoption of the clause by the Convention of 1846 by no means indicates a change in this attitude; rather, the clause seems to have been included without debate in the Bill of Rights in conformity with the Federal constitutional provision.

It is universally accepted that the Legislature has broad discretion in proscribing conduct as criminal and in determining the proper punishment (see *McGautha v California*, 402 US 183, 195-196; *Weems v United States*, 217 US 349, 379, *supra*; *People ex rel. Kemmler v Durston*, 119 NY 569, 577, *affd* 136 US 436, *supra*; *Lawton v Steele*, 119 NY 226, 233; *Matter of Bayard*, 25 Hun 546, 549, *supra*). It was, however,

recognized long ago that "the Constitution of this state confers power upon the courts to declare void legislative acts prescribing punishments for crime, in fact cruel and unusual" (*People ex rel. Kemmler v Durston*, 119 NY 569, 577, affd 136 US 436, *supra*; accord *Weems v United States*, 217 US 349, 378, *supra* ["our legal duty * * * is invoked"]; *Matter of Kemmler*, 136 US 436, 446-447, *supra* ["it would be the duty of the courts to adjudge"]; cf. *People v Gillson*, 109 NY 389, 398). Thus, the final judgment as to whether a punishment exceeds constitutional limitations is properly a judicial function.

It has been said that the term "cruel and unusual punishments" is not susceptible of precise definition (see *Furman v Georgia*, 408 US 238, 258, *supra* [BRENNAN, J., concurring]; *Weems v United States*, 217 US 349, 368-369, *supra*; *Wilkinson v Utah*, 99 US 130, 135-136; *Ralph v Warden*, 438 F2d 786, 789, cert den 408 US 942). Nevertheless, certain standards have evolved.

Historical analysis indicates that the constitutional proscription of cruel and unusual punishments was primarily intended to prohibit sadistic and purely degrading cruelty, that is, all forms of torture, whether outright barbarity or inhumane treatment for its own sake (see *Weems v United States*, 217 US 349, 370, *supra*; *Matter of Kemmler*, 136 US 436, 437, affg 119 NY 569, *supra*; *Wilkinson v Utah*, 99 US 130, 136, *supra*; *Wilkinson v Skinner*, 34 NY2d 53, 59-60; *People v Davis*, 33 NY2d 221, 226, *supra*; cf. *Trop v Dulles*, 356 US 86, 102 [plurality opn of WARREN, C. J.]; p 111 [BRENNAN, J., concurring] [psychological pain]). The constitutional limitation is not, however, confined to the physical or mental suffering inherent in the method of punishment or attending its mode of execution (but see *People v Mauceri*, 14 AD2d 479; cf. *Hartung v People*, 22 NY 95, 107; US Code, tit 10, § 855; Military Law, § 130.55). A constitutional "principle to be vital must be capable of wider application than the mischief which gave it birth" (*Weems v United States*, 217 US 349, 373, *supra*; see *Trop v Dulles*, 356 US 86, 103, *supra*). The courts have recognized that the cruel and unusual punishments clause is "progressive, and not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice" (*Weems v United States*, 217 US 349, 378, *supra*; *People v Davis*, 33 NY2d 221, 226, *supra* ["the amendment has come to mean much more"]). This evolutionary character was repeated in 1958 in *Trop v Dulles* (356 US

86, 101, *supra*): "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

The flexible nature of the cruel and unusual punishments clause has engendered re-examination of penalties once thought constitutional, in light of the "evolving standards of decency." In so doing, it has come to be recognized that the constitutional limitation encompasses a cardinal principle of "humane justice", namely, that punishment should be proportioned to the offense for which it is exacted. Thus, in addition to cruel punishments which are that because they are degrading, barbarous, or painful for their own sake (sometimes in question-begging fashion characterized as inherently cruel), prohibited also are those punishments which are "cruelly" excessive, that is, grossly disproportionate to the crime for which they are exacted (*Weems v United States*, 217 US 349, 367, *supra*; *People v Davis*, 33 NY2d 221, 226, *supra*). Although of relatively recent vintage, the concept of cruelly excessive punishment has assumed major significance in cases challenging noncapital punishments prescribed by law.

The theory that the punishment should fit the crime is of ancient origin (see, generally, Granucci, pp 844-847). In a day when many offenses were punished by discretionary amercement, or fining, imposition of these amercements was soon abused in an effort to increase royal revenue. Eventually the nobility was compelled to put an end to the ruinous system of discretionary amercement, and in 1215 King John was forced to include in Magna Carta three chapters banning excessive fines (Magna Carta, chs 20-22). Although perhaps more honored in principle than in practice, the prohibition against excessive punishment became a precept of the English common law (see *Hodges v Humkin*, Bulstrode's Reports, pp 139-140; see Granucci, p 847; for a discussion of the general severity of the English criminal law in the 18th century, see 1 Stephen, *History of the Criminal Law in England*, pp 457-492; see, also, 4 Blackstone, *Commentaries on the Law of England*, pp 369-372 [1st ed, 1769]).

In the Colony of New Amsterdam, despite severe corporal punishments authorized by law, ordinances prescribing penalties for certain crimes recognized that punishment should be inflicted according to the exigency of the case (see, e.g., Ordinance of 1638, in *The Laws and Ordinances of New Netherland*, pp 10, 12 [crimes should be punished "according to the

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circumstance of the case"]; Ordinance of 1656, tit III, p 273. This principle is recognized today in Penal Law, § 105, subd 4). The English prohibition of excessive punishment by amercement was also carried forward in the Colony of New York (see Charter of Liberties and Privileges of 1683, 1 Colonial Laws of New York, ch 1, p 113; ch 10 [1691], p 246). Thus, in many noncapital cases, sentencing courts in England and in colonial New York, in some instances acting without or in excess of statutory authority, "were presumed to take into account circumstances such as the baseness of the offense, the behavior and the age and standing of the defendant" (see Goebel and Naughton, Law Enforcement in Colonial New York, pp 682, 702).

That a cruelly excessive punishment violates constitutional limitations was first advanced in the Supreme Court by Mr. Justice FIELD in his dissent in *O'Neil v Vermont* (144 US 323). The punishment imposed in the *O'Neil* case was 54 years' imprisonment at hard labor for 307 cumulative offenses of selling liquor illegally. Justice FIELD, apparently basing his conclusion that the punishment was unconstitutionally excessive upon an intuitive sense that the punishment was disproportionate to the offender's moral culpability, stated: "The inhibition [of the Eighth Amendment] is directed, not only against punishments of the character mentioned [torture], but against all punishments which by their excessive length or severity are greatly disproportionate to the offences charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted. * * * It is against the excessive severity of the punishment, as applied to the offences for which it is inflicted, that the inhibition is directed" (pp 339-340, 364; for an earlier view of Justice FIELD's Eighth Amendment philosophy see *Ho Ah Kow v Nunan*, 12 F Cas 252 [No. 6546, CCD Cal 1879]; see, also, *Matter of Bayard*, 25 Hun 546, 549, *supra*, in which the principle of disproportionality was first mentioned by a New York court, but not applied ["punishments as disproportioned to the offense as to shock the conscience of the community" may violate constitutional limitations]; cf. *Gabrielson v Waydell*, 135 NY 1, 5, in which the court noted that a master of a vessel has considerable latitude in disciplinary powers allowed to him, though no "cruel or excessive punishment is sanctioned"). Beyond noting that the crime charged was not an offense in New York, the defendant's residence, and that more

serious crimes in Vermont were subject to less severe penalties, Justice FIELD did not articulate his reasons for concluding that the punishment was disproportionate.

Eighteen years later, in *Weems v United States* (217 US 349, *supra*), Justice FIELD's disproportionality principle commanded a majority (4-2) of the court participating. In the *Weems* case, the court had occasion to review a sentence imposed in the Philippines. The penalty involved was *cadena temporal*, punishments consisting of 12 years' and 1 day to 20 years' imprisonment at hard labor, carrying chains at wrist and ankle; civil interdiction; subjection to surveillance for life; and perpetual disqualification from the exercise of civil rights (see 217 US, pp 364-365). All this was for the crime of falsifying entries in a government cash book, "though there be no one injured, though there be no fraud or purpose of it, no gain or desire of it" (p 365). Justice MCKENNA, reacting with "wonder" at the severity of the punishment, restated Mr. Justice FIELD's proportionality principle: "Such penalties for such offenses amaze those who * * * believe that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense" (pp 366-367; see p 363).

The court, in determining that *cadena temporal* was cruel and unusual punishment, employed a comparative test, that is, it compared the punishments of *cadena temporal* with lesser penalties prescribed for a variety of more serious Federal crimes, including certain degrees of homicide, and for similar crimes under United States and Philippine law (pp 380-381). Although probably influenced by the unusual nature and inherent cruelty of some of the accessory penalties imposed in addition to imprisonment, the court invalidated the punishments of *cadena temporal* on the grounds that they violated constitutional limitations "both on account of their degree and kind" (p 377).

Later Eighth Amendment challenges to sentences imposed by law met with little success. In *Badders v United States* (240 US 391 [HOLMES, J.]), the court refused to strike down sentences of concurrent terms of imprisonment and fines for each separable offense of posting letters in furtherance of a fraudulent scheme. It did so by citing the pre-*Weems* case of *Howard v Fleming* (191 US 126), in which the court had rejected a claim that 10-year sentences for conspiracy to defraud were cruel and unusual. The citation of *Howard v Fleming* is significant in that in the *Howard* case the court expressed

strong opposition to one part of the comparative test as advanced in *Weems*: "That for other offenses, which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted does not make this sentence cruel" (pp 135-136).

Perhaps adulterated by the cruel features of *cadena temporal*, and undermined by the oblique repudiation of the comparative test in *Badders v United States*, the disproportionality principle of *Weems v United States* has been maintained in the Supreme Court since 1910 only through the vehicles of dissents and concurrences (see, e.g., *Rudolph v Alabama*, 375 US 889, 891 [GOLDBERG, J., dissenting from a denial of certiorari]; *Lambert v California*, 355 US 225, 231 [FRANKFURTER, J., dissenting]; *Milwaukee Pub. Co. v Burleson*, 255 US 407, 435 [BRANDEIS, J., dissenting]; *Robinson v California*, 370 US 660, 676, *supra* [DOUGLAS, J., concurring]; *Trop v Dulles*, 356 US 86, 105 [BRENNAN, J., concurring], *supra*; *United States ex rel. Marcus v Hess*, 317 US 537, 556 [FRANKFURTER, J., concurring]). It should be noted, however, that until 1962 the Eighth Amendment was not held applicable to the States through the due process clause of the Fourteenth Amendment (see *Robinson v California*, 370 US 660, 666, *supra*). Thus, Eighth Amendment challenges to sentences imposed in State courts were presumptively foreclosed.

In *Furman v Georgia* (408 US 238, *supra*), disproportionality as a basis for declaring penalties violative of the cruel and unusual punishments clause failed to command a majority of the court. Mr. Justice DOUGLAS concentrated in the *Furman* case on the thesis that the cruel and unusual punishments clause prohibits arbitrary and discriminatory punishments; indeed, he had previously adopted the disproportionality principle (see *Robinson v California*, 370 US 660, 676, *supra* [concurring opn]). In the *Furman* case, Mr. Justice BRENNAN recognized that the determination that a severe punishment is excessive may be grounded in disproportionality. He stated, however, that the more significant basis is that excessive punishment serves no penal purpose more effectively than a less severe punishment (408 US, p 380; cf. p 309 [STEWART, J., concurring] ["these sentences are 'cruel' in the sense that they go beyond * * * the punishments that the state legislatures have determined to be necessary"]; p 312 [WHITE, J., concurring] ["A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punish-

ment violative of the Eighth Amendment"]; but see p 451 [POWELL, J., dissenting] [for a critique of this test]. Mr. Justice MARSHALL concurred in this, carefully avoiding a disproportionality analysis (see pp 331-332). Dissenting, Mr. Justice POWELL asserted that disproportionality was a proper reason for condemning punishment as cruel and unusual, but limited it to punishments "grossly" or "greatly" disproportionate to the crime (see pp 451, 452). Chief Justice BURGER flatly rejected disproportionality analysis (see pp 391-396). Mr. Justices BLACKMAN and REHNQUIST joined in both the Chief Justice's opinion, and in Mr. Justice POWELL's opinion approving disproportionality analysis in limited cases (p 414).

Despite its relative nonuse in the Supreme Court, disproportionality as a basis for declaring punishments cruel and unusual in recent years has taken firm hold in the State and lower Federal courts. For example in *Ralph v Warden* (438 F2d 786, cert den 408 US 942, *supra*), the Fourth Circuit Court of Appeals held that the death penalty for the crime of rape without aggravating circumstances is so disproportionate to the offense as to violate the Eighth Amendment. In *Hart v Coiner* (483 F2d 136, cert den 415 US 938, *supra*) that same Circuit Court of Appeals held that a mandatory life sentence under a West Virginia recidivist statute was grossly disproportionate to the underlying offenses of writing a check for \$50 with insufficient funds, transporting across State lines forged checks in the amount of \$140, and perjury. In *Matter of Lynch* (8 Cal 3d 410, *supra*), the California Supreme Court struck down that State's mandatory maximum sentence of life imprisonment as grossly disproportionate to a second offense of indecent exposure (see, also, *Matter of Foss*, 10 Cal 3d 910, *supra*, in which a statute precluding parole consideration for a minimum period of 10 years imposed mandatorily upon an offender with a prior drug conviction was held to be so disproportionate to the offense of selling heroin as to violate the cruel or unusual punishments clause of the California Constitution). In *People v Lorentzen* (387 Mich 167, *supra*), the court held that a mandatory minimum sentence of 20 years for selling marijuana was so severe as to violate the Eighth Amendment. In *Workman v Commonwealth* (429 SW2d 374 [Ky], *supra*) a sentence of life imprisonment without possibility of parole for forcible rape committed by juvenile offenders was held to be unconstitutionally disproportionate to the offense (see, also, cases collected in *Matter of Lynch*, 8 Cal 3d

410, 423, n 13, *supra*; see, generally, Cruel Punishment—Length of Sentence, Ann., 33 ALR3d 335, 357–359).

Finally, this court in *People v Davis* (33 NY2d 221, 226, *supra*) adopted the principle that punishments disproportionate to the offense violate constitutional limitations (see, also, *Matter of Bayard*, 25 Hun 546, 549, *supra*).

~~THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v JAMES HARDING, Respondent.~~

~~Argued February 17, 1975; decided June 9, 1975~~

~~Crimes—evidence—prior testimony exception to hearsay rule—in trial of defendant police lieutenant for bribe receiving, grand larceny and related offenses, it was error to admit testimony given at prior departmental hearing by subsequently deceased witness, since prior testimony exception to hearsay rule under CPL 670.10 specifies only three instances in which such testimony taken in certain criminal judicial proceedings is permitted; there is no indication of intention to allow prior testimony taken in administrative proceeding, and rules of construction must be applied more circumspectly in criminal than in civil matters—improper admission of prior testimony was not reversible error, since it supplied little more than background material and was merely cumulative of direct proof, and case is, accordingly, remitted for consideration of appeal on facts.~~

~~1. In a trial of defendant police lieutenant for bribe receiving, grand larceny and related offenses, it was error to admit testimony given at a prior departmental hearing by a subsequently deceased witness. The prior testimony exception to the hearsay rule under CPL 670.10 specifies only three instances in which the use of testimony previously taken in certain criminal judicial proceedings is permitted. Unlike the broadly drafted civil statute (CPLR 4517), there is no indication of an intention to allow prior testimony given in an administrative proceeding, and in criminal matters the rules of construction must be applied more circumspectly.~~

~~2. The improper admission of prior testimony was not reversible error, since it supplied little more than background material and was merely cumulative of other direct proof of the defendant's criminal transactions. Accordingly, the case is remitted for a consideration of the appeal on the facts.~~

~~*People v Harding*, 44 AD2d 700, reversed.~~

~~APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered April 15, 1974, which (1) reversed, on the law, a judgment of the Supreme Court (JOSEPH M. SOVIERO, J.), rendered in Kings County upon a verdict convicting defendant of receiving unlawful gratuities (two counts), grand larceny in the third degree, promoting gambling in the second degree, official misconduct (two counts), conspiracy in the third degree (two~~

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LARRY C. MOSLEY

- vs -

CIVIL 75-416

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility

DORIS MC NAIR

- vs -

CIVIL 75-422

FRANCES CLEMENT, Acting Superintendent,
Bedford Hills Correctional Facility

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Here are two habeas corpus proceedings attacking the constitutionality of the New York State classification and sentencing provisions for the sale and possession of heroin.

The petitioner Mosley, following his guilty plea, was sentenced on September 23, 1975 by the Monroe County Court to an indeterminate term of one year to life. The petitioner

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McNair following a jury trial, was sentenced by the Monroe County Court on April 22, 1974 to concurrent terms of six years to life as a Class A-2 Felony of criminal possession of a controlled substance in the second degree under Penal Law Section 220.18, a Class A misdemeanor of criminal use of drug paraphernalia (2 counts) under Penal Law Section 220.50 and criminal possession of a hypodermic instrument under Penal Law, Section 220.45.

The two cases were consolidated for appeal on the issue of the constitutionality of the sentencing provisions of the New York Drug Law. The Appellate Division, Fourth Department, unanimously reversed Mosley's sentence and remanded the case for re-sentencing, and unanimously affirmed McNair's judgment. The Court of Appeals unanimously affirmed the orders of the Appellate Division, *People vs. Broadie*, 37 N.Y. 2d. 100, 37 N.Y. 2d. 471.

Both petitioners claim in these proceedings that the conviction and sentence of each was in violation of the Eighth Amendment and the Fourteenth Amendment of the Federal Constitution. The cases have been submitted for determination on written memoranda. On due consideration it is hereby

ORDERED that the conviction of each petitioner was not obtained in violation of the Federal Constitution

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in respect to the matters complained of. People vs.
Broadie, 37 N.Y. 2d. 100

Harold P. Burke

HAROLD P. BURKE
United States District Judge

June 22, 1977.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LARRY C. MOSLEY,

Petitioner

v.

Civ-75-416

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent

DORIS McNAIR,

Petitioner

v.

Civ-75-422

FRANCES CLEMENT, Acting Superin-
tendent, Bedford Hills Correctional
Facility,

Respondent

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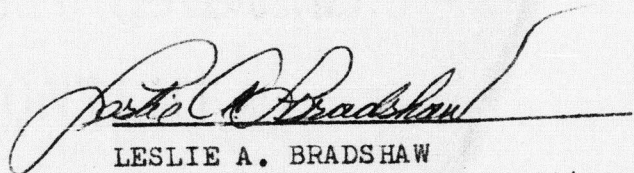
CERTIFICATE OF SERVICE

This is to certify that on March 2, 1978, I served one copy of this appendix on the following counsel by U.S. mail, postage prepaid:

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